

# **An analysis of the annulment mechanism under ICSID Jurisprudence**

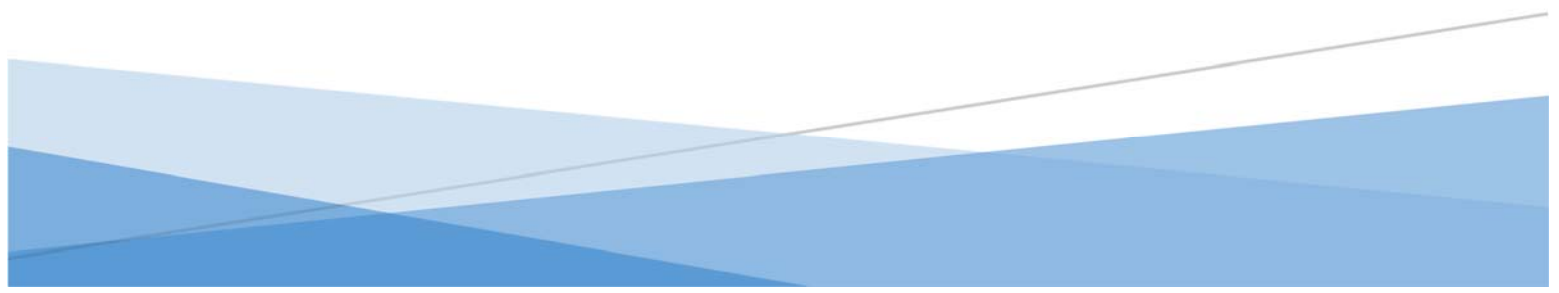
Mini-dissertation submitted in partial fulfilment of the requirement for the Master's of Laws (LLM) degree in International Trade and Investment Law in Africa, to International Development Law Unit, Centre for Human Rights, Faculty of Law

by

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## **Declaration**

Except for references specifically indicated in the text, and such help as I have acknowledged, this thesis is wholly my own work and has not been submitted for degree purposes at any other University.

## **Certification**

I declare that this Mini-Dissertation which is hereby submitted for the award of *Legum Magister* (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

**Linda Ajemba**

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## **List of acronyms**

<b>AB</b>	Appellate Body
<b>AF</b>	Additional Facility
<b>BIT</b>	Bilateral Investment Treaty
<b>DSB</b>	Dispute Settlement Body
<b>DSU</b>	Dispute Settlement Understanding
<b>EC</b>	European Community
<b>FDI</b>	Foreign Direct Investment
<b>ICC</b>	International Criminal Court
<b>ICJ</b>	International Court of Justice
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ICSID Convention</b>	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
<b>NAFTA</b>	North American Free Trade Agreement
<b>PCA</b>	Permanent Court of Arbitration
<b>TEC</b>	Treaty on the European Union
<b>UN</b>	United Nations
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>WB</b>	World Bank
<b>WTO</b>	World Trade Organisation

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- *Amco Asia Corporation and others v Republic of Indonesia*
- *Azurix Corp. v. The Argentine Republic*
- *CDC Group Plc v Republic of Seychelles*
- *Compañía del Desarrollo de Santa Elena, S.A. (CDSE) v Costa Rica*
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- *Hussein NaumanSoufraki v United Arab Emirates*
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- *Malaysian Historical Salvors, SDN, BHD v Malaysia*
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- *Mitchell v Democratic Republic of the Congo*
- *MTD Equity Sdn. Bhd. & MTD Chile S.A. v Chile*
- *Repsol YPF Ecuador S.A. v Empresa Estatal Petroleosdel Ecuador*
- *Salini Construction S.P.A and Italstrade SPA v Kingdom of Morocco (Salini)*

- *Sempra Energy Int'l v. Argentine Republic*
- *US – Stainless Steel*
- *Wena Hotels Ltd. v Arab Republic of Egypt*

## **List of Treaties and Instruments**

- ICSID
- NAFTA
- TEU
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## **Abstract**

The International Centre for Settlement of Investment Disputes (ICSID) is celebrating its half-century existence this year. Having presided over more than 525 cases in various topics including annulment; it is no surprise that it is described as the premier international investment arbitration institution in the world. Annulment was designed as an exceptional remedy to safeguard against violation of fundamental legal principles. This provision, enshrined in the ICSID Convention of 1966, stands out as the 'art', 'crown' and 'jewel' of ICSID jurisprudence.

The annual number of cases registered by ICSID increased rapidly in the last decade. To date, there are 160 signatories and contracting states to the ICSID Convention. Awards rendered under this mechanism are binding and have been successfully implemented without interference by domestic courts.

What this statistic fails to show is that the rate of annulment has increased considerably. This implies that out of every 344 arbitration cases registered; 150 ICSID Convention awards have been rendered and 53 annulment proceedings instituted. This is against the background that only few annulment applications existed in the institutions' early years. This remedy has been pursued by both claimants and respondents to ICSID proceedings. Approximately 57 percent of annulment proceedings have been initiated by respondents (in all instances, states), 36 percent by claimants and 7 percent by both parties.

The annulment mechanism is deployed by ICSID *in lieu* of providing an appellate option. Dissatisfied parties have employed this mechanism to challenge awards rendered by the institution.

It follows that, despite the institution's uniqueness and widely recognised success in international arbitration, annulment negates the principle of finality and certainty – one of the core principles of arbitration.

The above flaw has led to the withdrawal of Latin America countries from the ICSID Convention. Bolivia was the first to withdraw as it denounced its membership in 2007. This was followed by Ecuador in 2010 and Venezuela in 2012. Countries like the United States, South Africa and Germany have also revisited this provision and called for review of the whole system.

This research calls for reform of the ICSID annulment mechanism. It arrives at practical alternatives to be adopted by the institution aimed at creating finality and predictability in the international arbitration system.

This mini-dissertation argues that finality and predictability can be achieved under ICSID by establishing an appellate mechanism drawing lessons from the institutional framework of the World Trade Organization Appellate Body Dispute Settlement System (WTO - DSS).

If the annulment mechanism negates the principle of finality in international arbitration, then the ICSID objective of attaining predictability in international arbitration remains fictitious. This research therefore adds to the growing voice that argues that amendment of the annulment procedure is long overdue.

A domestic lawyer [...] might be forgiven for thinking it strange that the international community, apparently so well equipped with means of judicial settlement, appears to lack what seems to be a natural or inherent feature of natural judicial systems, namely a comprehensive system of appeal<sup>1</sup>

**Eli Lauterpacht**  
**Honorary Professor of International Law**

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<sup>1</sup>E. Lauterpacht (1991) *Aspects of the Administration of International Justice* quoted in CJ Tams, 'An Appealing Option? The Debate about an ICSID Appellate Structure'(2006) 57 *Essays in Transnational Economic Law* 2.

# Chapter 1: Introduction

## 1.1 Background to the research

The International Centre for Settlement of Investment Disputes (ICSID) was established under the supervision of the World Bank Group to adjudicate investment disputes between states and nationals of other states.<sup>2</sup> The ICSID Convention of 1966 sets out the procedure for setting aside an award rendered under the institution and is thus regarded as ‘the bedrock on which the ICSID edifice is built.’<sup>3</sup>

Prior to the coming into force of the ICSID Convention, executive directors of World Bank underscored the need to foster international investment and boost the world economy.<sup>4</sup> The need to protect investments of foreign investors in host countries was further emphasised. It was in view of the above that steps were initiated to draft and implement the ICSID Convention.<sup>5</sup>

The drafting history of the ICSID Convention in the early 1960s showed the intent of the drafters to insulate the system from domestic laws and the involvement of domestic courts.<sup>6</sup> This led to the creation of an entirely self-contained treaty which covers provisions from commencement of arbitration to the enforcement of the award. These provisions include those covering arbitration and conciliation proceedings, rules governing the procedure, post award remedies, and provisions on recognition and enforcement. These provisions underscore the autonomous nature of ICSID arbitration.<sup>7</sup> It is as a result of the above that arbitration under the ICSID Convention is subject to no other form of remedy except those provided in the ICSID Convention.<sup>8</sup> What this implies is that parties under this system can only resort to remedies

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<sup>2</sup> C Schreuer *The ICSID Convention: a commentary* (2001) 21.

<sup>3</sup> ICSID ‘Post-Award Remedies - ICSID Convention Arbitration’ <https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Post-Award-Remedies-Convention-Arbitration.aspx> (accessed 2 October 2015).

<sup>4</sup> A. Alexandrov, Stanimir, *The Evolution of the Full Protection and Security Standard, in Building International Investment Law: The First 50 Years of ICSID* (Meg Kinnear, Geraldine Fischer, Jara Minguez Almeida, Luisa Fernanda Torres, and Mairée Uran Bidegain eds.) (2015) 319.

<sup>5</sup> As above.

<sup>6</sup> AR Parra (2012) *The History of ICSID* 20.

<sup>7</sup> JO Voss (2010) *The impact of investment treaties on contracts between host states and foreign investors* 299.

<sup>8</sup> J Chin (2016) *The divergence of post award remedies in ICSID and non-ICSID arbitration: a perspective of foreign investors' interest* 22.

under the ICSID Convention and cannot bring a challenge under domestic courts based on domestic law or other treaties.<sup>9</sup> The choice of remedies reflects a deliberate attempt by drafters of the ICSID Convention to ensure finality of awards. The only way an ICSID award is reviewed is pursuant to five specific remedies provided by the ICSID Convention.<sup>10</sup>

It follows that the inclusion of the annulment provision under the ICSID Convention was part of the drafters' objectives of the ICSID Convention to attain predictability under the institution.<sup>11</sup> This provision, contained under ICSID Convention Article 52 (1) was preceded by five years of preparatory works by staff and executive directors of the World Bank in 1961 and 1962.<sup>12</sup> This was followed by a series of regional consultative meetings and meetings of legal committees consisting of representatives of all interested states held at the end of 1964. The result of these meetings was the submission of a draft ICSID Convention incorporating Article 52 on the annulment provision in 1965 to executive directors of World Bank. This was followed by approval of the final text of the ICSID Convention in 1965 and the entering into force of the Convention on 14<sup>th</sup> October 1966.<sup>13</sup>

## 1.2 Research problem

Notwithstanding the aforesaid, the number of applications for annulment registered annually reflects a vast increase of unpredictable decisions of *ad-hoc* committees.<sup>14</sup> Recent statistics have shown that one third of all ICSID arbitration is subject to annulment.<sup>15</sup> This has led to the intense and renewed criticism of the ICSID annulment mechanism by practitioners, users and commentators.<sup>16</sup>

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<sup>9</sup>Schreuer (n 2 above) 210.

<sup>10</sup>ICSID Convention of 1966 arts 50-52.

<sup>11</sup> JP Commission 'Precedent in investment treaty arbitration – a citation analysis of a developing jurisprudence' (2007) 131 *Journal of International Arbitration* 130-135.

<sup>12</sup>International Centre for Settlement of Investment Disputes (ICSID) (2012) Background Paper on Annulment for the Administrative Council of ICSID 11.

<sup>13</sup>As above.

<sup>14</sup>SD Franck 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (2005) 73 *Fordham Law Review* 1521.

<sup>15</sup>TH Cheng 'The role of justice in annulling investor-state arbitration awards' (2013) 31 *Berkeley Journal of International Law*, <http://scholarship.law.berkeley.edu/bjil/vol31/iss1/7> 237 (accessed 15 October 2015)

<sup>16</sup>As above.



These criticisms highlighted in the 2011 letter of the Republic of Philippines to members of the ICSID Administrative Council expressed disappointment over what the Philippines termed ‘a seriously flawed decision’<sup>17</sup> of the *ad-hoc* committee in annulling the decision of the tribunal in *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*.<sup>18</sup>

The Philippines highlighted in the above letter the *ad-hoc* committee’s excess exercise of its mandate under Article 52 of the ICSID Convention as a threat to the efficacy and continued acceptance of ICSID arbitration.<sup>19</sup> It underlined the need for finality and consistency of ICSID awards and the implications of such inconsistencies which can be attributed to *ad-hoc* committees’ delving into the substantive merits of tribunals’ decisions. Although the Philippines recommended that ICSID issue some guidelines to correct the above anomaly, such is yet to be initiated.<sup>20</sup>

It is in view of the foregoing that the ICSID secretariat in its discussion paper titled ‘Possible Improvements of the Framework for ICSID Arbitration’<sup>21</sup> proposed establishment of an ICSID Appeals Facility to correct the shortcomings of the ICSID annulment mechanism. Such facility, according to ICSID, shall be included in provisions of treaties contracted between parties to operate under a set of ICSID Appeals Facility Rules adopted under the Administrative Council of ICSID. Unfortunately, the institution has abstained from pursuing the above proposal in the short term.

It follows that the continuous misapplication of provisions of Article 52 only prolongs and aggravates disputes by encouraging applications that are not worthy of annulment.<sup>22</sup> This in turn promotes unnecessary initiations of another round of arbitration<sup>23</sup> thereby undermining

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<sup>17</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* ICSID Case ARB/03/25.

<sup>18</sup> As above.

<sup>19</sup> ‘Background Paper on Annulment For the Administrative Council of ICSID annex 2’ (2012) [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment\\_English.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf) (accessed 18 November 2015).

<sup>20</sup> As above.

<sup>21</sup> ICSID ‘Possible improvements of the framework for ICSID arbitration’ ICSID Secretariat Discussion Paper, 2004 <http://www.worldbank.org/icsid> (accessed on 16 April 2016).

<sup>22</sup> Branson, DJ & Tupman W, M ‘Selecting an arbitral forum: a guide to cost effective international arbitration’ (1984) 1 *Virginia journal of international law* 917.

<sup>23</sup> Gleason E ‘International arbitral appeal, what are we so afraid of?’ (2007) 7 *Pepperdine Law Review Journal* 285.

the finality of awards rendered by the institution and the legitimacy of the entire ICSID mechanism.<sup>24</sup>

It is these concerns relating to the lack of finality and legal uncertainty characterised by ICSID awards that necessitated this study.

### 1.3 Research questions

As previously noted, the broad question this research seeks to analyse is whether the annulment mechanism under ICSID jurisprudence is a limited exception to the principle of finality? To achieve this goal, these questions will be addressed and answered:

- i. What are the core principles of international arbitration?
- ii. Is the interpretation of provisions of Article 52(1) in line with the core principles of international arbitration?
- iii. What lessons can be drawn from the Appellate Body mechanism of the WTO in addressing inconsistencies of ICSID *ad-hoc* committees' decisions?

### 1.4 Thesis statement

This study argues that the annulment mechanism under ICSID jurisprudence is a limited exception to the principle of finality and that an appellate mechanism should be established to remedy the inconsistencies of *ad-hoc* committees' decisions. Put differently, the lack of finality and inconsistency characterising ICSID arbitration could be remedied by establishing an appellate mechanism that draws lessons from the institutional frameworks of the WTO DS Appellate Body mechanism<sup>25</sup>

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<sup>24</sup>C Smith 'The appeal of ICSID Awards: how the AMINZ Appellate Mechanism can guide reform of ICSID procedure' (2013) 41 *Georgia Journal of International and Comparative Law* 567.

<sup>25</sup>S Singh & S Sharma 'Investor-state dispute settlement mechanism: the quest for a workable roadmap' (2013) 29 76 *Merkourios Utrecht Journal of International and European Law* 88.

## 1.5 Significance of the study

The ICSID institution has been described as the premier international arbitration institution in the world.<sup>26</sup> According to Tai Heng Cheng, the annulment provision under the ICSID Convention is the central element in determining predictability and finality of ICSID awards.<sup>27</sup>

Annulment is a unique remedy designed to enhance the conclusiveness of ICSID awards.<sup>28</sup> This remedy has been subject to severe criticisms as a result of the inconsistent and sometimes confused decisions of *ad-hoc* committees. This in turn has led the ICSID secretariat to tender proposals for reform of the annulment mechanism.<sup>29</sup>

It follows that the success of ICSID arbitration in attaining predictability and finality of awards is dependent on reform of the annulment mechanism. If the annulment mechanism is not urgently reformed, then the ICSID objective of attaining predictability in international arbitration remains mythical.<sup>30</sup>

This research is significant because it will contribute to the debate on whether annulment under ICSID Convention constitutes a limited exception to the principle of finality.<sup>31</sup> The subject is timely because, in a globalised world where investment plays a significant role, a dispute settlement mechanism that is predictable, consistent and ensures finality in investment disputes is indispensable.<sup>32</sup>

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<sup>26</sup>Schreuer (n 2 above) 211.

<sup>27</sup>TH Cheng 'The Role of Justice in Annulling Investor-State Arbitration Awards' (2013) 31 *Berkeley Journal of International Law* <http://scholarship.law.berkeley.edu/bjil/vol31/iss1/7> (accessed 02 October 2015).

<sup>28</sup>HV Houtte 'Article 52 of the Washington Convention: A Brief Introduction' in E Galliard (ed) *Annulment of ICSID Awards* (2004) 11.

<sup>29</sup> ICSID (n 20 above) 2.

<sup>30</sup>K Sauvart Appeals mechanism in international investment disputes (2008) 207

<sup>31</sup>Schreuer (n 2 above) 212.

<sup>32</sup> United Nations Conference on Trade and Development (UNCTAD) 'Transnational Corporations and the infrastructure challenge' World Investment Report (2008) [http://unctad.org/en/DOCs/wir2008\\_en.pdf](http://unctad.org/en/DOCs/wir2008_en.pdf) (accessed 21 November 2015).

## 1.6 Literature review

The call for reform of the annulment mechanism under ICSID jurisprudence has attracted several scholarly writings and schools of thought. The research relies on scholarly writings by Christoph Schreuer and Christopher Smith. Essays by T Wald, C Knahr, KG Kaufmann-Kohler, C Tams, S Franck, A Reinisch, F Spoorenberg and A Crivellaro to prove that annulment under the ICSID mechanism is a limited exception to the principle of finality of awards that undermines legitimacy of the ICSID system. More literature touching on the subject will be consulted in the progress of the research.

From the scholarly literature, the most contentious issue is the call for establishment of appellate mechanism within the ICSID system. This debate is aimed at curbing the judicial uncertainty, unpredictability and lack of finality that presently characterises the ICSID system in the resolution of international arbitration. Christoph Schreuer is of the school of thought that the complex nature, cost and growing incidence of request for annulment has raised both concerns and calls for reform of the ICSID system.<sup>33</sup>

Christopher Smith,<sup>34</sup> supporting this argument, states that this creates problems for parties involved in any specific dispute and the legal regime as a whole. Knahr<sup>35</sup> proposes consolidating related proceedings as a mechanism for resolving the issue of inconsistent decisions. This school of thought is supported by Spoorenberg<sup>36</sup> and Crivellaro<sup>37</sup> who are of the view that such consolidation should address the conflicting outcomes experienced by parties and further minimise costs.

An appellate mechanism modelled on the WTO Appellate Body mechanism is a different school of thought proposed by Kaufmann-Kohler.<sup>38</sup> This author subscribes to the view that the problem of inconsistency prevalent in ICSID jurisprudence would be solved if there were to be an appellate structure modelled on the WTO Appellate Body mechanism. In supporting this

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<sup>33</sup>Schreuer (n 2 above) 11.

<sup>34</sup>Smith (n 23 above) 567.

<sup>35</sup>C Knahr, C Koller, W Rechberger, A Reinisch (eds) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 19.

<sup>36</sup>F Spoorenberg & J E Vinuales 'Conflicting decisions in international arbitration' (2009) *Law and Practice of International of International Courts and Tribunals* 91.

<sup>37</sup>A Crivellaro 'Consolidation of arbitral and court proceedings in investment disputes' (2005) 4 3 *Law & Practice of International Courts and Tribunals* 371.

<sup>38</sup>KG Kaufmann 'Arbitral precedent: dream, necessity of excuse? – The 2006 Freshfield Lecture' (2007) 23 3 *Arbitration International* 378.

view, Reinisch<sup>39</sup> states that such adoption would address the inconsistencies and unpredictability characterized by the ICSID system. Other advocates have suggested the introduction of an appellate facility under ICSID.<sup>40</sup> Proponents are of the view that, in order to avoid criticisms of amendment of the ICSID Convention, an appellate body should be created under the ICSID Appeals Facility Rules which could easily be adopted without seeking approval of all member states by the Administrative Council of ICSID.<sup>41</sup>

Furthermore, the establishment of a treaty-based appellate body is supported by Gantz.<sup>42</sup> In a paper titled 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges', Prof Gantz<sup>43</sup> states that the procedural inconsistencies of the ICSID mechanism should be addressed *via* the establishment of an appellate mechanism incorporated in treaties between the parties.

Frank's<sup>44</sup> view converges with that of Gantz as he proposes the establishment of an appellate independent body non-affiliated to any of the existing Conventions, for example UNICITRAL and New York Convention of 1958. In support of this view, Harten<sup>45</sup> opines that such an independent single international investment court should preside and review all investment arbitration awards for legal errors and interpretation.

There are some opponents to the reform of the annulment mechanism under ICSID jurisprudence. Walde<sup>46</sup> argues that, in comparison with other investor-state dispute settlement bodies such as the Permanent Court of Arbitration (PCA) and the International Court of Justice (ICJ), the existing system is much better as inconsistencies are unavoidable features prevalent

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<sup>39</sup>A Reinisch 'The future of investment arbitration' in Binder, C; Kriebaum, U; Reinisch, A and Wittich, S (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009) 915.

<sup>40</sup>Gleason (n 22 above) 269.

<sup>41</sup>R Gaiger 'Multilateral approach to investment' in J Alvarez and KP Sauvart (eds) *The Evolving International Investment Regime* (2011) 170.

<sup>42</sup>DA Gantz 'Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' (2013) 29 76 *Merkourios Utrecht Journal of International and European Law* 39.

<sup>43</sup>As above.

<sup>44</sup>Franck (n 14 above) 617.

<sup>45</sup>V Harten *Investment Treaty Arbitration and Public Law* (2007) 180.

<sup>46</sup>T Walde 'Improving the mechanism for treaty negotiation and investment disputes: competition and choices as the path to quality and legitimacy' (2009) *Yearbook on International Investment Law and Policy* 506.

even in international commercial arbitration. In support of this view are Tams<sup>47</sup> and Franck.<sup>48</sup> Tam argues that an appellate mechanism will hamper the fundamental aims of arbitration which are finality of awards as well as time and cost efficiency.

In light of the above literature review, it is evident that the question of reform of some aspects of ICSID procedural jurisprudence is not universally agreed upon and requires further reflection. It is not easy to decide whether the establishment of appellate mechanism under the auspices of ICSID should be created *via* an appeals facility or modelled on the WTO Appellate Body mechanism with a view to addressing the lack of finality facing ICSID. The inconsistencies, unpredictability and lack of finality that characterise ICSID jurisprudence has already led to the withdrawal of some Latin American Countries and might lead to total collapse of the whole system if not urgently addressed.<sup>49</sup> Thus, the writer agrees with proponents for reform of the ICSID annulment mechanism who have made a persuasive case for the establishment of an appellate mechanism modelled on the WTO Appellate Body system. This research argues that such appellate mechanism adopting lessons from the WTO Appellate Body mechanism is indispensable to attain finality, consistencies and predictability in adjudication of international investment disputes.

## **1.7 Research methodology**

This study will be desktop- and library-based and will include the review of conventions, case laws, textbooks, journal articles and other published and unpublished relevant materials on procedural aspects of ICSID. The approach adopted will be descriptive, analytical and prescriptive. The descriptive approach will be used to describe the grounds for the annulment procedure of ICSID, while the analytical approach will be used to evaluate whether this procedure has contributed to the inconsistency, unpredictability and lack of finality of ICSID awards. The prescriptive approach will be used to formulate recommendations.

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<sup>47</sup> C Tams 'An appealing option? the debate about an ICSID appellate structure' (2006) 57 *Essays on Transnational Economic Law* 1.

<sup>48</sup> S Frank 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 2 *Harvard International Law Journal* 435.

<sup>49</sup> M. Waibel, A. Kaushal, K. H Liz Chung, and C. Balchin, *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) 353.

## 1.8 Limitations to the study

The scope of this study is limited to the analysis of the annulment procedure under ICSID jurisprudence. In this regard, it will not analyse the procedures of other arbitral institutions or the institutions themselves, except where they are mentioned as similar international arbitration institutions to ICSID.

## 1.9 Overview of chapters

The study consists of five chapters as set out below:

- Chapter One is an introductory chapter covering the background to the research, research problem, research questions, thesis statement, significance of the study, a literature review, methodology and limitations to the study.
- Chapter Two defines foreign direct investment (FDI). It provides an overview of the historical development of ICSID arbitration and the annulment provision under the ICSID Convention of 1966. The chapter highlights the core principle of international arbitration and underscores its importance as the rationale for inclusion of post award remedies under the ICSID Convention.
- Chapter Three defines annulment and sets out the steps under the ICSID arbitration mechanism. It analyses the grounds for annulment as stipulated in Article 52(1) of the ICSID Convention. The analysis is conducted by reviewing the 'three generations' and subsequent decisions of *ad-hoc* committees on annulment to determine whether such decisions are in line with the core principles of international arbitration.
- Chapter Four will draw on the appellate body mechanism of the WTO and examine the best practices that could be embraced by ICSID.
- Chapter Five summarises the salient findings of this study, draws conclusions and makes recommendations.

## Chapter 2: Overview of ICSID Convention arbitration

### 2.1 Introduction

The question this chapter attempts to interrogate is: what are the core principles of international arbitration? In answering this question, this chapter defines FDI and provides an overview of the historical development of ICSID arbitration and the annulment provision under the ICSID Convention. The chapter examines the rationale for incorporation of post award remedies particularly annulment provision under the ICSID Convention.

### 2.2 What is FDI?

The Organisation for Economic Co-operation and Development (OECD) defines foreign direct investment as:

reflecting the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor.<sup>1</sup>

It is important to note that the ICSID Convention does not define the term “investment”. The result of the above is multiple interpretations and the splitting of views between ICSID arbitral tribunals. There are two tests which have arisen, namely the “subjective” and “objective” tests.<sup>2</sup> The subjective test stipulates that, to determine ICSID jurisdiction, a study of the parties’ respective BITs should be carried out as to determine their intended objective.<sup>3</sup> The objective test requires the tribunal, on the other hand, to look at the ICSID Convention which establishes an objective limitation separate from the intention of the parties to determine ICSID jurisdiction.<sup>4</sup> This second approach is highlighted in the case of *Salini Construction S.P.A v Morocco (Salini)*.<sup>5</sup>

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<sup>1</sup> The ‘OECD Revised Benchmark Definition of FDI’ (2008) 20.

<https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf> (accessed 03 March 2016)

<sup>2</sup> WB Hamida *Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control, Ad Hoc Committee’s Decision in Patrick Mitchell v. Democratic Republic of Congo* (2007) 301 24 *Journal of International Arbitration* 287.

<sup>3</sup> Hamida (n 2 above) 289.

<sup>4</sup> Hamida (n 2 above) 290.

<sup>5</sup> *Salini Construction S.P.A and Italstrade SPA v Kingdom of Morocco* ICSID Case ARB/00/4, Decision on Jurisdiction (July 23, 2001), 6 ICSID Report 398 (2004).



In *Salini*, the tribunal defined investment as having four basic elements:<sup>6</sup>

(a) contributions in cash, kind or labour [by the investor] (b) certain duration of performance (c) investor participation in the risks of the transaction and (d) investor contribution to development of the host state.

The implication of the above is that while some tribunals adopts the entire *Salini* test (representing the objective test),<sup>7</sup> others have adopted either amended form or the subjective test version. It is worth noting that, although the ICSID Convention did not define what constituted an investment, the definition is provided in a number of BITs.<sup>8</sup>

It follows that the aim of drafting the ICSID Convention goes beyond resolution of investment disputes.<sup>9</sup> This aim, as stated in the preamble of the ICSID Convention, is to “stimulate economic development through the promotion of private international investment”<sup>10</sup>. What this means is that countries recognised the need for private foreign investment and strived to create conditions that attracts foreign investors. One of those conditions is the availability of appropriate mechanisms for the settlement of investment disputes.

Prior to the drafting of the ICSID Convention, settlement of investment disputes took place in the domestic courts of host countries. What this implies is that, oftentimes, the likelihood of obtaining an impartial decision from domestic courts was very slim. This is because national courts are bound to apply domestic law even where it is detrimental to investors’ right under international law. Furthermore, domestic courts of states other than the host state are precluded either due to lack of territorial jurisdiction or the complex nature of

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<sup>6</sup> *Salini* (n 5 above) 413.

<sup>7</sup> *Consortium R.F.C.C. v. Kingdom of Morocco ICSID Case ARB/00/and Joy Mining Machinery Limited v. Arab Republic of Egypt ICSID Case ARB/03/11*.

<sup>8</sup> The relevant text of some BITs states as follows: “[Investment is defined as] every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts, and includes: (i) tangible and intangible property, including all property rights, such as . . . ; (ii) a company or shares or stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment; (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trades [sic] secrets and know how, and goodwill; (v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products; (vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and (vii) returns which are reinvested.” Hamida (n 2 above) 301

<sup>9</sup> A. Grabowski, ‘The Definition of Investment under the ICSID Convention: A Defense of *Salini*,’ (2014) 289, 15 *Chicago Journal of International Law* 13.

<sup>10</sup> As above.

investment disputes from exercising jurisdiction because of the host states' sovereign immunity.

In contrast to the above is the introduction of international arbitration, particularly ICSID arbitration. ICSID arbitration offers advantages both to the investors and host states. The investor avoids the disadvantages of litigation in domestic courts and enjoys access to an effective international forum. The host state, on the other hand, makes its climate suitable for other foreign investors.

It is in view of the above that World Bank directors proceeded to draft the ICSID Convention between 1961 and 1965 under the framework of the International Bank for Reconstruction and Development (IBRD).<sup>11</sup> During the drafting history of the ICSID Convention, the need to attain finality of awards was highlighted as a core principle of international arbitration. It was as a result of the above that the annulment provision was included under the ICSID Convention. Below is a review of historical development of annulment provision under the ICSID Convention.

### **2.3 Historical development of ICSID annulment provision**

The drafting history of the annulment provision as contained under the ICSID Convention of 1966 was preceded by five years of preparatory works, negotiations, consultations, regional consultative meetings and legal committee meetings.<sup>12</sup> These meetings were held amongst government officials, international legal experts, staff and executive directors of the World Bank.<sup>13</sup>

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<sup>11</sup>C Schreuer *The ICSID Convention: a commentary* (2001) 15.

<sup>12</sup>Yearbook of the International Law Commission (1958) 286, UN Doc. A/CN.4/SER.A/1958/Add.1.

<sup>13</sup>As above.

The annulment provision as reflected in Article 52(1) of the ICSID Convention of 1966 sets out five specific grounds upon which an *ad-hoc* committee may annul an award.<sup>14</sup> These grounds were derived from the 1953 United Nations International Law Commission Draft Convention on Arbitral Procedure and were thus referred as the “ILC Draft”.<sup>15</sup> The ILC Draft was an effort to codify existing international law on arbitral procedure in state-to-state arbitration.<sup>16</sup> It was based on the recognition that finality of an award is an essential feature of arbitral practice. It “sought to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice.”<sup>17</sup>

Although the grounds for annulment were derived from the ILC Draft, these provisions were not contained in the earliest draft of the ICSID Convention.<sup>18</sup> It was in view of the above that an identical provision similar to the ILC Draft was included in the preliminary draft of the ICSID Convention in 1963 which was referred as the “Preliminary Draft”.<sup>19</sup>

It is important to note that, under the Preliminary Draft, no question, argument or proposals were posed for modification of the annulment provision. Also, no issues were raised concerning the general purpose and scope of annulment throughout the drafting history of the ICSID Convention. The summary meetings report of the World Bank General Counsel only highlighted a considerable number of technical errors to be rectified in the annulment provision.<sup>20</sup>

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<sup>14</sup>The relevant part of the provision states as follows;

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

<sup>15</sup>Documents of the Fifth Session Including the Report of the Commission to the General Assembly, (1953) 2 Yearbook of the International Law Commission 211, U.N. Doc. A/CN.4/SER.A/1953/Add.

<sup>16</sup>As above.

<sup>17</sup>Documents of the Fifth Session (n 64 above) 205.

<sup>18</sup>International Centre for Settlement of Investment Disputes (ICSID) (2012) Background Paper on Annulment for the Administrative Council of ICSID 7.

<sup>19</sup>As above.

<sup>20</sup>ICSID (n 18 above) 8.

However, the beginning of the regional consultative meetings ushered in a series of proposals for amendment of the annulment provision in the Preliminary Draft. These proposals were initiated by participants in the first set of regional consultative meetings where questions emanated from legal experts requesting an expansion of the annulment provision.<sup>21</sup> According to these experts, such expansion was aimed at modelling the annulment provision on commercial arbitration laws. Although this proposal was rejected on the grounds that the annulment provision only offered limited recourse and should therefore not be compared with commercial arbitration, the proposal to make the annulment provision more restrictive was approved by the committee.<sup>22</sup>

Following the above, an agreement was reached to make the first ground for annulment that is excess of powers, more restrictive by inserting the term “manifest” in order to warrant annulment.<sup>23</sup> Unlike the first proposal, the second proposal was accepted on the basis that it covered situations where a decision of a tribunal exceeded the parties’ intention as contained in their arbitration agreement.<sup>24</sup> Also, stakeholders at these regional consultative meetings agreed that there should be existence of manifest excess of power where a tribunal applies a law different from that agreed by parties as evidenced in their arbitration agreement.<sup>25</sup>

Similar to the first proposal, other proposals, specifically replacing the third ground “fundamental rule of procedure” with “fundamental principles of justice”, failed as the former was understood to have a wider connotation than the latter.

In view of conclusions arrived at the regional consultative meetings, World Bank staff prepared an additional draft to replace the Preliminary Draft called the “First Draft”. This Draft was presented to a legal committee composed of experts representing member governments of World Bank for further consideration.

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<sup>21</sup>Documents of the Fourth Session Including the Report of the Commission to the General Assembly, (1952) 2 Yearbook of the International Law Commission 211, U.N. Doc. A/CN.4/SER.A/1953/Add.

423, U.N. Doc. A/CN.4/SER.A/1953/Add.

<sup>22</sup>Documents of the Fourth Session (n 70 above) 303.

<sup>23</sup>Documents of the Fourth Session (n 70 above) 517.

<sup>24</sup>Documents of the Fourth Session (n 70 above) 518.

<sup>25</sup>ICSID (n 18 above) 8.

In November and December of 1964, the legal committee held a series of meetings where additional clarifications' regarding the "manifest excess of power" ground was made. Clarification regarding inclusion of an additional ground of "improper constitution of the tribunal" as one of the grounds for annulment was further made. In its statement, the committee explained that the additional ground was:

intended to cover a variety of situations such as for instance, [1] absence of agreement or invalid agreement between the parties [2] the fact that the investor was not a national of a contracting state [3] that a member of the tribunal was not entitled to be an arbitrator ... etc.<sup>26</sup>

Furthermore, suggestions to amend the annulment ground concerning corruption on the part of a member of the tribunal failed<sup>27</sup> leaving the ground for annulment relating to a serious departure from a fundamental rule of procedure and failure to state reasons as stand-alone grounds in the First Draft.<sup>28</sup>

Except for the amendment made on the last ground, that is, that failure to state reasons be not subject to parties' agreement, no further modification was made to the revised draft of the First Draft.<sup>29</sup>

Consequently, a Revised Draft Convention on the Settlement of Investment Disputes ("Revised Draft") was prepared.<sup>30</sup> This revised draft became the final draft of the annulment provision as contained in the ICSID Convention. This final draft represents the present-day provisions of Article 52 ICSID Convention.

One of the unique features of the ICSID Convention following its entry into force in 1966 is its autonomous nature. ICSID awards are final and binding and are not subject to appeal or other remedy except those provided by the Convention. This choice of remedies reflects a deliberate attempt by drafters of the Convention to ensure finality of awards. It is in view of the above that post-award remedies were incorporated into the Convention.

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<sup>26</sup>Documents of the Fourth Session (n 70 above) 851.

<sup>27</sup>Documents of the Fourth Session (n 70 above) 852.

<sup>28</sup>Documents of the Fourth Session (n 70 above) 633.

<sup>29</sup>ICSID (n 18 above) 11.

<sup>30</sup>ICSID (n 18 above) 12.

## 2.4 Post award remedies under ICSID Convention arbitration

As stated above, the only way an ICSID award can be reviewed is pursuant to certain specific grounds provided by the Convention. They are:

- a. Rectification and Supplementary Decision<sup>31</sup> – the Tribunal can rectify any clerical, arithmetical or similar error and may decide any question it omitted to decide in its award
- b. Interpretation<sup>32</sup> – the Tribunal may interpret its award where there is a dispute between the parties as to the meaning or scope of the award rendered
- c. Revision<sup>33</sup> – the Tribunal may revise its award on the basis of a newly discovered fact of such a nature as to decisively affect the award
- d. Annulment<sup>34</sup> – an *ad hoc* Committee may fully or partially annul an award on the basis of proof of the five basic grounds provided under the Convention.<sup>35</sup>

These grounds with the exception of annulment are examined in turn.

### 2.4.1 Rectification or supplementary decision

A party may request a tribunal to decide any question which it believes has been omitted in the award. A party may also request a tribunal to rectify a clerical, arithmetical or similar error. The tribunal, upon receipt of such request, shall rectify any clerical, arithmetic or similar error in the award.

The essence of this remedy is to correct inadvertent omissions and minor technical errors that may have occurred in the drafting of the award by the tribunal. It is not designed for a

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<sup>31</sup> ICSID Convention art 49(2) and ICSID Arbitration Rule 49.

<sup>32</sup> ICSID Convention art 50.

<sup>33</sup> ICSID Convention art 51.

<sup>34</sup> ICSID Convention art 52.

<sup>35</sup> ICSID (n 18 above) 3.

substantive review of tribunal's decision.<sup>36</sup> This remedy is available only in respect of awards. Decisions preliminary to awards, especially decisions on jurisdiction and provisional measures, are not subject to this procedure.

#### *How to apply*

Where a party believes a tribunal has omitted to decide a question in an award, it shall request for a supplementary decision or modification of the award within 45 days after the award was rendered. Such request shall identify details of the award, date of the request, question omitted to be decided by the tribunal and error sought to be rectified, and shall be accompanied with a lodging fee of USD 10 000.<sup>37</sup>

Rectification or supplementation is available only upon request by a disputing party made to the Secretary General of ICSID. The tribunal may not issue such request on its own initiative.

#### *Procedure*

Upon payment of the lodging fee, the request will be registered and transmitted to the other party and to the tribunal. The time limit for the filing of observations is fixed by the tribunal. Unlike other post-award remedies, this remedy can only be made by the tribunal that rendered the award. Decisions from request for supplementation and rectification become part of the award<sup>38</sup> and all rules relating to an award under the convention<sup>39</sup> also apply. Time limits for request for revision or annulment do not begin to run until a decision on a request for rectification and supplementation is rendered.

While request for supplementation is discretionary, rectification is mandatory once pointed out to the tribunal. Supplementation is useful and likely to be corrected where the omission is a result of an oversight by the tribunal. It is unlikely to be corrected where the omission is a result of a considered and deliberate decision by the tribunal. In such circumstance, request for annulment may be a better remedy.<sup>40</sup>

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<sup>36</sup>UNCTAD Dispute Settlement, ICSID 2.8 Post Award Remedies and Procedures (2003) 7.

<sup>37</sup>Schreuer (n 11 above) 878.

<sup>38</sup>As above.

<sup>39</sup>ICSID Convention arts 48, 49, 50, 51, 52, 53 & 54.

<sup>40</sup>UNCTAD (n 36 above) 7.

In *CDSE v Costa Rica*,<sup>41</sup> the claimant submitted a request for rectification of an award, which was rendered on 17 February 2000. After receipt of written observations from the respondent, the tribunal gave its decision on 8 June 2000. It corrected two minor clerical errors and a mistake in the identification of a witness. It refused, however, to correct an alleged misstatement of a party's position on a point of law arguing that such alleged misstatement was an accurate summary of the claimant's stated position.<sup>42</sup>

The same decision was given in *Amco v Indonesia*.<sup>43</sup> The claimant in this case requested rectification on seven specified questions, which it alleged the tribunal omitted to decide, and further rectification on certain matters identified as clerical, arithmetical or similar errors. With the exception of one, the tribunal rejected all points requested for rectification. It held that there was no decision that the tribunal had omitted to take or any clerical, arithmetical or similar error that must be rectified.

However, in *LETCO v Liberia*,<sup>44</sup> a request for rectification succeeded, although the tribunal pointed out that the post-award remedy of revision may have been a better cause of action.

#### **2.4.2 Interpretation**

Where there is a dispute between parties as to the scope or meaning of a tribunal's award, either party may request interpretation of the award.<sup>45</sup> Such a request must relate to the meaning or scope of the award. General complaints regarding an award's lack of clarity would not succeed.

The essence of this procedure is to clarify the meaning of the original award. The request must relate to an award only. Except incorporated into an award, a decision preliminary to an award such as a decision on jurisdiction or on provisional measures is not subject to this procedure.<sup>46</sup>

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<sup>41</sup>R D Bishop, J Crawford, W M Reisman, *Foreign Investment Disputes: Cases, Materials, and Commentary*, *Ad-Hoc committee's Decision in CDSE v Costa Rica (2005)*1562.

<sup>42</sup>UNCTAD (n 36 above) 8.

<sup>43</sup> *Amco v Indonesia* 1 ICSID Reports 512 – 542.

<sup>44</sup>*LETCO v Liberia* 2 ICSID Reports 343.

<sup>45</sup> ICSID Convention art 50 and ICSID Arbitration Rules 50, 51, 53 & 54.

<sup>46</sup>UNCTAD (n 36 above) 9.



### *How to apply*

After an award is rendered, either party may file an application for interpretation of the meaning and scope of an award. Such application shall identify the award, state date of application, explain precise points in issue and be accompanied with a lodging fee of USD 10 000.<sup>47</sup>

Unlike other post-award remedies, request for interpretation has no time limit. It can be submitted at any time after an award has been rendered. Successive requests for interpretation may also be made by parties without limitation.

### *Procedure*

Upon payment of the lodging fee, the request shall be registered. Notice shall be given to the other party. The request shall be transmitted to the tribunal that rendered the award. The original tribunal shall be requested to inform the Secretary General of its willingness in interpreting the award. Where this is not possible, the parties shall constitute a new tribunal with the same number of arbitrators as the former tribunal and adopting the same procedures<sup>48</sup>

In appointing a new tribunal, it may be advisable to appoint one or more arbitrators who served in the original tribunal. The duty of the new tribunal is to ascertain the meaning of the original award and not to re-write it.<sup>49</sup>

A request for interpretation must emanate from one of the disputing parties. Conduct of an interpretation process is similar to that of arbitration. This includes a first session of the tribunal, the written and the oral processes.

Request for stay of enforcement of an award pending interpretation by a tribunal can be made by a party.<sup>50</sup> Such a procedure is similar to annulment proceedings. Decisions on interpretation for purposes of recognition and enforcement become part of the award,<sup>51</sup> but

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<sup>47</sup>ICSID (n 18 above).

<sup>48</sup>As above.

<sup>49</sup>UNCTAD (n 36 above) 9.

<sup>50</sup>ICSID Convention art 50(2) and ICSID Arbitration Rule 54.

<sup>51</sup>ICSID Convention art 53(2).

cannot itself be the object of supplementation and rectification, interpretation, revision or annulment.

### **2.4.3 Revision**

On discovery of a new fact that could decisively affect an award, a party may apply for revision.<sup>52</sup> Such new element must be one of fact and not of law and must relate to an award. A new fact is deemed decisive if it would have resulted in a different decision had it been known to the tribunal.<sup>53</sup> Revision is not available in respect to decisions preliminary to an award.

For a request to succeed, the new fact must have been unknown to the tribunal and the applicant when the award was rendered. An applicant's ignorance of the fact must not be due to negligence.

#### *How to apply*

The application must be made within 90 days after the new fact in issue has been discovered and 3 years from the tribunal has rendered the award. The application shall identify the award, state date of application, particularise the change sought, detail the new fact decisively affecting the award, show proof that the award was rendered without applicant's knowledge which said proof must not be due to applicant's negligence and be accompanied with a lodging fee of USD 10 000.

#### *Procedure*

On receipt of the lodging fee for revision, the application shall be registered and transmitted to the other party and the tribunal that rendered the award. Members of the original tribunal shall be requested to notify the Secretary General of their willingness to take part in the revision proceeding. This is recommended as a better option since the original tribunal will be in the best position to determine whether the new fact was unknown at the time of rendering the award. Where this is not possible, the parties shall constitute a new tribunal which shall

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<sup>52</sup>ICSID Convention art 51 and ICSID Arbitration Rules 50, 51, 53 & 54.

<sup>53</sup>UNCTAD (n 36 above) 11.

compose of the same number of arbitrators and adopting the same method as the original tribunal.<sup>54</sup>

In *AMT v Zaire*, the Democratic Republic of Congo made an application for revision. The application was submitted to the original tribunal. The tribunal at the end of its deliberation ruled in favour of the complainant. Request for revision must come from one of the parties to the dispute. Conduct of a revision proceeding is similar to conduct of an arbitration proceeding.<sup>55</sup>

Request for stay of enforcement of an award pending revision by a tribunal can be made by a disputing party.<sup>56</sup> Such a procedure is similar to annulment proceedings. A decision on interpretation for purposes of recognition and enforcement becomes part of the award.<sup>57</sup>

## 2.5 Conclusion

The chapter highlighted the historical development of ICSID arbitration and the annulment provision under the ICSID Convention. It underscored the need for finality of awards as a core principle of international arbitration. The chapter noted that finality of awards was the underlying objective for the incorporation of post-award remedies under the ICSID Convention.

The chapter further identified annulment as the most controversial post-award remedy described as a limited exception to the principle of finality. It is pointed out that this remedy, which will be discussed in the next chapter, is not only detrimental to the ICSID arbitration mechanism but also global FDI flows; hence need for it to be urgently addressed.

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<sup>54</sup>ICSID Arbitration Rule 51.

<sup>55</sup> ICSID Arbitration Rule 53.

<sup>56</sup> ICSID Convention art 50(2) and ICSID Arbitration Rule 54.

<sup>57</sup> ICSID Convention art 53(2).

## Chapter 3: Why annulment is a limited exception to the principle of finality?

### 3.1 Introduction

The previous chapter analysed the historical development of ICSID arbitration and the annulment provision under the ICSID Convention. It highlighted finality of awards as a core principle of international arbitration and the underlying rationale for inclusion of post award remedies under the ICSID Convention.

In view of the above, this chapter seeks to answer the following question: Is the interpretation of provisions of Article 52(1) in line with the core principles of international arbitration? This chapter will answer the above question through the prism of ‘three generations’ and recent annulment committees’ decisions. The aim of the selection of cases and subsequent discussion herein is to highlight the inconsistent and sometimes confused decisions of *ad-hoc* committees’. This will be done by defining annulment and highlighting the steps that need to be taken under ICSID arbitration. The chapter analyses the grounds for annulment to determine whether *ad-hoc* committees’ interpretation of these grounds enhances finality of awards, underlined as a core principle of international arbitration.

### 3.2 Defining annulment under ICSID jurisprudence

According to Christoph Schreuer,<sup>1</sup> annulment is a unique remedy designed for extraordinary circumstances. It is not a routine step to be employed by a losing party under ICSID arbitration. Houtte<sup>2</sup> has defined annulment as:

a unique element of the ICSID system that gives ICSID a competitive advantage over other investor state arbitral forums by removing the possibility of judicial review by domestic courts and replacing it with a system of review by ad hoc annulment committees established by the ICSID Secretariat.<sup>3</sup>

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<sup>1</sup>C Schreuer, ‘Three Generations of ICSID Annulment Proceeding’ (1986) 55 *Journal du droit International* 17.

<sup>2</sup>HV Houtte ‘Article 52 of the Washington Convention: A Brief Introduction’ in E Galliard (ed) *Annulment of ICSID Awards* (2004) 11.

<sup>3</sup>Houtte (n 2 above) 12.

The *ad-hoc* committee in *Klockner v Cameroon*<sup>4</sup> underscored that annulment is different from an appeal. While the former is concerned with legitimacy of the process, the latter deals with substantive correctness of an award.

Annulment is the formal termination, cancellation or revocation of a judicial proceeding. It is the act of rendering a decision of an ICSID tribunal invalid upon proof of any of the five grounds as provided under the ICSID Convention.<sup>5</sup> The consequence of this remedy is the legal destruction of an original decision without substituting it.<sup>6</sup> The main purpose of the annulment provision is to safeguard against the violation of fundamental legal principles relating to an award.<sup>7</sup> Annulment consists of rules governing the steps and procedures to be followed.

### 3.3 Rules governing an ICSID annulment procedure

The annulment procedure under ICSID Convention is governed by:<sup>8</sup>

- a) The ICSID Convention of 1966 Article 52(1)
- b) Administrative and Financial Regulations
- c) The Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

These three regulations complement each other in stipulating the steps, procedures and limitations of the annulment process.<sup>9</sup> The ICSID Convention of 1966 is a multilateral agreement binding on all the signatory states. It provides the framework for conduct of annulment proceedings, specifically the underlying powers of *ad-hoc* committees to annul an award. The Administrative and Financial Regulations contain provisions in relation to the cost of proceedings, publication of case related information, functions of individual proceedings,

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<sup>4</sup>*Klößner Industrie-Anlagen GmbH. Republic of Cameroon (Klößner I)*, ICSID Case ARB/81/2, Decision on Annulment (May 3, 1985), 2 ICSID Report (1994).

<sup>5</sup>ICSID Convention 1966 art 52(1).

<sup>6</sup>D Caron 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal' (1992) 7 1 *ICSID Review – Foreign Investment Law Journal* 21-56.

<sup>7</sup>As above.

<sup>8</sup>C Schreuer *The ICSID Convention: a commentary* (2001) 890.

<sup>9</sup>A Broches 'A Guide for Users of the ICSID Convention' (1991) 8 1 *News from ICSID* 5.

calculation of time limits, supporting documents submission, immunities, privileges, and official languages usage.<sup>10</sup>

The ICSID Arbitration Rules complement the ICSID procedural provisions in relation to annulment and other post award remedies.<sup>11</sup> These arbitration rules – particularly rules 50 and 52-55 – become effective only upon registration of an arbitration request and stipulate conduct and steps to post award remedies of interpretation, revision and annulment. The following illustrates the steps involved in an ICSID annulment proceeding.

### **3.4 Steps involved in an ICSID annulment proceeding**

Either party to ICSID arbitration may request annulment where such a party is dissatisfied with an award rendered by an ICSID tribunal.<sup>12</sup> Such a request triggers steps in an annulment proceeding.

The request is addressed to the Secretary General of ICSID.<sup>13</sup> It must be made within 120 days after an award was rendered.<sup>14</sup> Where a request is made on the grounds of corruption; “such application shall be made within 120 days after discovery of the corruption and in any event within 3 years after the date on which the award was rendered.”<sup>15</sup>

The request must contain information identifying the award, date of application and details of ground(s) on which the application was formed, and must be accompanied with a lodging fee of USD 25 000.<sup>16</sup> The information contained in the request may be developed in greater detail in subsequent phases of the proceedings where an applicant fails to do so at the initial stage.<sup>17</sup>

A request for annulment shall be filed in any of the basic official languages of the Centre (which are English, French or Spanish) and shall not be accepted by the Secretary-General for

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<sup>10</sup>L Reed; J Paulsson & N. Blackaby (2010) *Guide to ICSID Arbitration* 113.

<sup>11</sup>A Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 2 *ICSID Review—Foreign Investment Law Journal* 427-448.

<sup>12</sup>ICSID Convention 1966 art 52(1).

<sup>13</sup>As above.

<sup>14</sup>ICSID Convention 1966 art 52(2).

<sup>15</sup>As above.

<sup>16</sup>JF Armesto 'Different systems for the annulment of investment awards, ICSID review' (2011) 26 1 *Foreign Investment Law Journal* 128.

<sup>17</sup>UNCTAD Dispute Settlement, ICSID 2.8 Post Award Remedies and Procedures (2003) 27.

registration after the prescribed time-limit.<sup>18</sup> What this means is that all grounds for annulment must be submitted with the application before expiration of the time limit as prescribed by the ICSID Convention. After such expiry, a party shall be precluded from relying on any additional ground.<sup>19</sup>

The above position was confirmed in *Amco v Indonesia*.<sup>20</sup> The claimant argued that the plea advanced by the defendant was time barred as this was the first time it was indicated after the prescribed time limit. Although the committee accepted the argument of the claimant, it held that a plea made within the time limit with a statement to develop such plea later shall be deemed to have been made within prescribed time limit. This is true in that such a statement shall be deemed to have been adopted together with the plea at the time it was filed.<sup>21</sup>

Furthermore, an annulment request must emanate from one of the parties to the dispute.<sup>22</sup> This means that an annulment proceeding cannot be initiated by a third party. It follows therefore that a party who initiates a request and submits such request outside the prescribed time limit may be deemed to have waived its right to request annulment. Also, a party may waive its right explicitly,<sup>23</sup> that is where it clearly fails to raise an objection before an arbitral tribunal regarding a defect that may give rise to annulment.<sup>24</sup>

A request for annulment is followed by its registration.<sup>25</sup> Upon such registration, it is the duty of the Chairman of the Administrative Council of ICSID to appoint a three person *ad-hoc* committee from the Panel of Arbitrators.<sup>26</sup>

It is clear that the aim of ICSID in stipulating the above strict criterion is to avoid conflict of interest and ensure a bias-free annulment procedure. On acceptance of the above appointment, the *ad-hoc* committee commences its deliberation.<sup>27</sup> Such deliberation shall be

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<sup>18</sup>Schreuer (n 8 above) 892.

<sup>19</sup> ICSID Arbitration Rule 50(1)(c).

<sup>20</sup>*Amco Asia Corp. v Republic of Indonesia (Amco Asia)*, ICSID Case ARB/81/1, Decision on Annulment (May 16, 1986), 1 ICSID Reports (1993) 521-528.

<sup>21</sup>As above.

<sup>22</sup>UNCTAD (n 17 above) 28.

<sup>23</sup>*Amco Asia* (n 20 above) 513-528.

<sup>24</sup>ICSID Arbitration Rule 27, 1 ICSID Reports 167.

<sup>25</sup>ICSID Arbitration Rule 50, 1 ICSID Reports 178.

<sup>26</sup> ICSID Convention 1966 art 52(3).

<sup>27</sup>L A Mistelis 'Washington /ICSID Convention, 1965-Interpretation, Revision and Annulment of the Award

based upon the grounds employed by the disputing parties.<sup>28</sup> An *ad-hoc* committee's deliberation shall result in the award being rejected or upheld in part or whole.<sup>29</sup> The *ad-hoc* committee in *MINE v. Guinea*<sup>30</sup> reiterated its authority to partially annul an award when it held thus:

Guinea's request for partial annulment is clearly admissible. It seeks the annulment of the portion of the Award adjudging MINE's claim. It does not request annulment of the portion of the Award adjudging Guinea's counter-claim. Nor, for that matter, has annulment of that portion been requested by MINE. That portion of the Award will remain in effect regardless of the annulment in whole or in part of the portion of the Award in respect of which Guinea has formulated its request for annulment.<sup>31</sup>

It is interesting to note that an award upheld in part or whole may be re-submitted to a newly constituted tribunal where such request is made by either party to the dispute.<sup>32</sup> Such awards are subject to annulment.<sup>33</sup> Annulment does not apply to decisions interpreting or revising awards.<sup>34</sup> Decisions preliminary to jurisdictions or on provisional measures are also not subject to annulment except where they are incorporated into the award. The implication is that only awards are subject to annulment.<sup>35</sup>

An application for annulment must be confined to the five basic grounds itemized under Article 52(1) of ICSID Convention.<sup>36</sup> An *ad-hoc* committee may not annul an award on other grounds. This means that a request for annulment must be brought under one or more grounds listed in Article 52(1) of the ICSID Convention. These grounds are analysed in turn.

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Award: Article 52 (Annulment)' in A Loukas & D Mistelis (eds) *Concise International Arbitration* (2010) 131.

<sup>28</sup>ICSID Convention 1966 art 52(1).

<sup>29</sup>ICSID Convention art 52(6) and ICSID Arbitration Rule 55(1).

<sup>30</sup>*Mar. Int'l Nominees Establishment v. Republic of Guinea (MINE)*, ICSID Case ARB/84/4, Decision on Annulment (December 22, 1989), 4 ICSID Report (1997) 82.

<sup>31</sup>As above.

<sup>32</sup>*MINE* (n 31 above) 109.

<sup>33</sup> ICSID Arbitration Rule 48(2) and 53.

<sup>34</sup>UNCTAD (n 17 above) 29.

<sup>35</sup>*SPP v. Egypt*, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports 131.

<sup>36</sup>ICSID Convention 1966 art 52(1).



### 3.5 Grounds for annulment

A party requesting annulment in putting forward the ground (s) for annulment must do so cumulatively.<sup>37</sup> The grounds for annulment under ICSID Convention are listed exhaustively under Article 52(1) as follows:

- (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
  - a) That the Tribunal was not properly constituted
  - b) That the Tribunal has manifestly exceeded its powers
  - c) That there was corruption on the part of a member of the Tribunal
  - d) That there has been a serious departure from a fundamental rule of procedure or
  - e) That the award has failed to state the reasons on which it is based.<sup>38</sup>

#### 3.5.1 Improper constitution of arbitral tribunal

This ground has not at any time in the history of the ICSID arbitration employed by any disputing party.<sup>39</sup> What this implies is that improper constitution of tribunal may be employed concerning questions relating to nationality of arbitrators, qualification of arbitrators or allegation of conflict of interest as provided under the ICSID Convention.<sup>40</sup>

It follows therefore that the rationale for lack of exercise of this ground may be attributed to greater oversight of the constitution of tribunals by the institution.<sup>41</sup> Except for facts hidden at the time of constitution,<sup>42</sup> a party who fails to avail itself of this ground where it has the opportunity to do so shall be precluded from doing so after the award has been rendered.<sup>43</sup>

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<sup>37</sup>As above.

<sup>38</sup>ICSID Convention art 52(1).

<sup>39</sup>UNCTAD (n 17 above) 17.

<sup>40</sup>ICSID Convention arts 38 & 39.

<sup>41</sup>UNCTAD (n 17 above) 17.

<sup>42</sup>As above.

<sup>43</sup>As above.

### 3.5.2 Manifest excess of powers

Unlike the first ground, manifest excess of powers takes place where a tribunal ousts outside the limits of its jurisdiction or fails to apply the law as agreed by parties.<sup>44</sup> This means that arbitrating outside parties' agreement can constitute excess of power. For such act to qualify as a ground for annulment, such abuse of power must be obvious that is, recognisable with little effort.<sup>45</sup>

It follows that the greatest form of excess of power occurs where a tribunal that lacks jurisdiction renders a decision.<sup>46</sup> For a tribunal to have jurisdiction, it must possess all the requirements as listed in Article 25 of ICSID Convention.<sup>47</sup> Anything short of that means the tribunal lacks jurisdiction. A similar position can be taken where a tribunal fails to exercise jurisdiction when in fact it has power to do so. Such failure constitutes excess of powers and is usually rendered in the form of an award.<sup>48</sup>

It is important to underscore the difference between failure to apply the proper law and erroneous application of the proper law.<sup>49</sup> While the former constitutes a case of manifest excess of powers as provided under Article 42(1)<sup>50</sup> and is a ground for annulment,<sup>51</sup> the latter does not qualify as excess of power and is therefore not a ground for annulment.<sup>52</sup>

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<sup>44</sup>UNCTAD (n 17 above) 18.

<sup>45</sup>As above.

<sup>46</sup>As above.

<sup>47</sup>The relevant part of Article 25 states: 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally...' Article 25 ICSID Convention 1966.

<sup>48</sup> UNCTAD (n 17 above) 18.

<sup>49</sup>As above.

<sup>50</sup> ICSID Convention 1966.

<sup>51</sup>*Amco Asia* (n 20 above) 515.

<sup>52</sup>*Klöckner I* (n 4 above) 119.

### 3.5.3 Corruption of an arbitrator

Although this third ground is an obvious ground for annulment, it has never been alleged in ICSID proceedings.<sup>53</sup> Corruption may be alleged based on the existence of an improper act of an arbitrator that is influenced by personal interest.<sup>54</sup> Also, acceptance of an inappropriate payment relating to ICSID arbitration shall be assumed to constitute corruption. Corruption cannot be alleged on mere bias without evidence of improper payment.<sup>55</sup> Again, conflict of interest is deemed to exist where an arbitrator derives personal gain from outcome of a proceeding.<sup>56</sup> Due to sensitive nature of this ground, Article 52(2) stipulates a special time limit of 120 days after discovery of corruption and an absolute period of 3 years after the award has been rendered for a successful invocation of this ground.<sup>57</sup>

### 3.5.4 Serious departure from a fundamental rule of procedure

The above ground is aimed at safeguarding the principles of fairness in ICSID arbitration.<sup>58</sup> Integral to this principle is the right of the parties to be heard (*audiatur et altera pars*).<sup>59</sup>

To successfully rely on this ground, the departure must be deliberate as well as affect a fundamental rule.<sup>60</sup> It must be consequential rather than minimal. It must have actually affected the concerned party and deprived such party of the intended benefit in question.<sup>61</sup>

The underlying rationale is that not every departure from the procedural rules in the ICSID Convention or Arbitration Rules qualifies as a departure from fundamental rule of procedure.<sup>62</sup> For instance, arbitrators shall not be guilty of departure from a fundamental rule where they rely their decision on an argument which was not raised by parties in dispute.<sup>63</sup> By contrast, arbitrators shall be guilty under this rule where they fail to give parties the right to be

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<sup>53</sup>UNCTAD (n 17 above) 21.

<sup>54</sup>R Bishop & S. Marchili *Annulment under the ICSID Convention* (2012) 184.

<sup>55</sup>As above.

<sup>56</sup>UNCTAD (n 17 above) 23.

<sup>57</sup>As above.

<sup>58</sup>As above.

<sup>59</sup>G Petrochilos 'Procedural Law in International Arbitration' (2004) 243 20 *Oxford Private International Law Series* 3.

<sup>60</sup>UNCTAD (n 17 above) 24.

<sup>61</sup>As above.

<sup>62</sup>M Kinnear; GR Fisher; JM Almeida; LF Torres & MU Bidegain *Building International Investment Law: The First 50 Years of ICSID* (2015) 710.

<sup>63</sup>*Klöckner I* (n 4 above) Reports 129.

heard.<sup>64</sup> The implication of the above is that tribunals are not prevented from adopting legal reasoning not put forward by the disputing parties. This position was succinctly expressed in *Klöckner v Cameroon* where the *ad-hoc* committee relevantly held:

...arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been). Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a serious departure from a fundamental rule of procedure<sup>65</sup>

It is worth noting that an aggrieved party must object within a reasonable time.<sup>66</sup> Failure to do so can amount to a waiver of a party's right under Arbitration Rule 27.<sup>67</sup> Such a party shall be precluded (for purposes of annulment) from relying on this ground at a later stage.<sup>68</sup>

### 3.5.5 Failure to state reasons

Statement of reasons is mandatory for the orderly administration of justice.<sup>69</sup> As enshrined in Article 48(3) of the ICSID Convention, this duty is total and may not be deferred under any circumstance. Parties' agreement not to state reasons would be null and invalid.<sup>70</sup>

Notwithstanding the above, non-statement of reasons has never occurred under ICSID proceedings.<sup>71</sup> The more likely occurrence is non-statement of reasons for certain parts of an award.<sup>72</sup> Also, insufficiency of reasons, that is, a reason that does not clearly explain how a decision was arrived at, may not adequately be referred as statement of reasons.<sup>73</sup>

It is important to note that *ad-hoc* committees have held in a number of cases that the acceptable standard for stating of reasons is that which is 'sufficiently relevant.'<sup>74</sup> This means that such reasons, being subjective must be a total of conclusions reached.<sup>75</sup> It follows that

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<sup>64</sup>As above.

<sup>65</sup>As above.

<sup>66</sup>UNCTAD (n 17 above) 25.

<sup>67</sup>ICSID Arbitration Rules.

<sup>68</sup>ICSID Arbitration Rules 128.

<sup>69</sup>ICSID Convention 1966 art 48(3).

<sup>70</sup>*MINE* (n 31 above) 88.

<sup>71</sup>Caron (n 6 above) 35.

<sup>72</sup>*Klöckner I* (n 4 above) 149.

<sup>73</sup>As above.

<sup>74</sup>*Klöckner I* (n 4 above) 148.

<sup>75</sup>*Amco Asia* (n 20 above) 520.

reasons which are contradictory can constitute a ground for annulment.<sup>76</sup> Also, while failure to deal with every question may not be a ground for annulment,<sup>77</sup> failure to deal with fundamental questions shall constitute a valid ground for annulment.<sup>78</sup>

It is worth mentioning at this juncture that in a considerable number of cases, *ad hoc* committees have shifted from interpreting the relevant grounds for annulment, which has been the traditional focus of ICSID arbitration and instead delved into the substantive merits of tribunals' decisions.<sup>79</sup> This shift has triggered the rendering of inconsistent decisions by committees which imperils the ultimate legitimacy of ICSID arbitration. This is evidenced in the "three generations and subsequent decisions of *ad-hoc* committees."<sup>80</sup> These decisions are considered in two phases, first looking at the "three generations" and thereafter looking at recent *ad-hoc* committee decisions.<sup>81</sup>

### 3.6 First generation of decisions of *ad-hoc* committees

Scholars like Christoph Schreuer<sup>82</sup> have criticized this generation as having a broader interpretation of annulment powers than that conferred under Article 52 of the ICSID Convention. What this means is that *ad-hoc* committees in this generation have stepped beyond their boundaries and delved into substantive merits of tribunals' decisions.

They have thus "improperly crossed the line between annulment and appeal"<sup>83</sup> and "re-examined merits of a tribunal's award."<sup>84</sup> The two main decisions here are those rendered in *Klöckner v Cameroon*<sup>85</sup> and *Amco v Indonesia*.<sup>86</sup> These decisions highlight how *ad-hoc* committees' have ousted outside their jurisdiction to annul tribunal's award thereby undermining finality of awards under ICSID jurisprudence.

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<sup>76</sup>*Klöckner I* (n 4 above) 137.

<sup>77</sup> ICSID Convention art 52(1)(e).

<sup>78</sup>*MINE* (n 31 above) 82.

<sup>79</sup>D Kim 'The annulment committee's role in multiplying inconsistency in ICSID arbitration: the need to move away from an annulment based system' (2011) 86 242 *New York University Law Review* 263.

<sup>80</sup>As above.

<sup>81</sup>Kim (n 80 above) 244.

<sup>82</sup>C Schreuer, 'ICSID Annulment Revisited' (2003) 103 30/2 *Legal Issues of Economic Integration* 104.

<sup>83</sup>C Schreuer (n 83 above) 105.

<sup>84</sup>WM Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration* (1989) 739.

<sup>85</sup>*Klöckner I* (n 4 above) 95.

<sup>86</sup>*Amco Asia* (n 20 above) 509.

### **3.6.1 *Klockner v Cameroon***

The facts of this case are as follows: the complainant entered into a contract with the Government of Cameroon which contract objective was to manage and a joint venture fertiliser factory in the Republic of Cameroon. After a number of years of unprofitable operations, the Cameroonian government closed the factory. Klöckner filed a request for arbitration under ICSID, claiming the balance of the price of the factory.

The Cameroonian Government counter-claimed, demanding damages for losses incurred during the course of the project. The tribunal awarded damages in favour of the claimant and the defendant filed for annulment of the tribunal's decision relying on the provisions of ICSID Convention Article 52(1). The *ad-hoc* committee annulled the award on grounds that the tribunal manifestly exceeded its powers by failing to apply the proper law and by failing to state reasons on which the award was based.

This decision was criticised by scholars for engaging in the actual review of the tribunal's decision and annulling the award on this ground.<sup>87</sup> The reasoning behind the criticism is that the committee, in exercising its discretion, annulled the award on basis of a claim that the tribunal applied the Cameroonian law and presumed existence of some basic legal principles rather than proving existence of such principles.<sup>88</sup>

The *ad-hoc* committee held that the reasons provided by the tribunal were not "sufficiently relevant."<sup>89</sup> From the above, it is obvious that the tribunal ousted outside its mandate by reviewing the tribunal's decision.

### **3.6.2 *Amco v Indonesia***

In this second case,<sup>90</sup> the *ad-hoc* committee refused to annul an award on the basis that the tribunal identified the proper law but failed to apply it. The complainant, a foreign investor, entered into a 30-year lease agreement with the Government of Indonesia with the objective of managing and developing a hotel and office block in Indonesia. Following the agreement, Amco invested huge sums of money in the project. While the contract was on-going, Amco

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<sup>87</sup>J Clapham, 'Finality of investor-state arbitral awards: has the tide turned and is there a need for reform?' (2009) 26 *Journal of International Arbitration* 437.

<sup>88</sup>As above.

<sup>89</sup>*Klöckner I* (n 4 above) 95.

<sup>90</sup>*Amco Asia* (n 20 above) 524.

engaged in a dispute with its local partner company. The dispute led to the take-over of the hotel by the local partner with the assistance of the Indonesian armed forces. This was aggravated by the revocation of Amco's investment license by the Indonesian Government stating failure of Amco to fulfill its obligations. Amco then requested ICSID arbitration. In deciding in its favor, the tribunal held that in accordance with the law of Indonesia and rules applicable under international investment law, Indonesia had revoked the license without due process and its action could not be justified. Indonesia applied for annulment.

The *ad-hoc* committee annulled the decision of the tribunal on grounds that the proper law was recognised but not applied, thereby manifestly exceeding its powers. A detailed examination of the tribunal's award shows that, in arriving at its decision, it actually undertook a thorough study of Indonesian law before determining the full amount of investment made by the foreign investor to qualify as such. One would wonder at the meaning of the committee's decision in stating that the decision of the tribunal in applying the proper law was so incorrect that it in fact amounted to non-application.<sup>91</sup> Also, the argument under the plain interpretation that the tribunal did not apply the proper law made little or no sense. The annulment committee, by arriving at the above conclusion, eliminated any meaningful difference between non-application of proper law and erroneous application of proper law. While the former constitutes a manifest excess of power and a ground for annulment, the latter does not qualify as a ground for annulment.<sup>92</sup>

It is worth noting that the above two cases applied the wide and vague description of the obvious excess of power definition<sup>93</sup> to review tribunals' decision substantively. They were both criticised for re-examining the merits of each case and improperly crossing the border between annulment and appeal.<sup>94</sup>

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<sup>91</sup>Kim (n 80 above) 263.

<sup>92</sup>Kim (n 80 above) 264.

<sup>93</sup>Schreuer (n 83 above) 105.

<sup>94</sup>GR Delaume 'The finality of arbitration involving states: recent developments' (1989) 32 *5 Arbitration International* 21.

### 3.7 Second generation of decisions of *ad-hoc* committees'

The second generation of *ad-hoc* committees' decisions was more conservative in its approach contrary to the approach adopted by the first generation. Although this generation mitigated concerns expressed under the first generation, its decisions was nonetheless viewed as undermining the legitimacy of ICSID arbitration.<sup>95</sup> These decisions are expressed in the cases of *Klöckner v Cameroon II*, *Amco v Indonesia II*<sup>96</sup> and *Maritime International Nominees Establishment (MINE) v Republic of Guinea*.<sup>97</sup>

#### 3.7.1 *Klöckner v Cameroon II*

This is a continuation of the earlier decisions of the *ad-hoc* committee under the first generation.<sup>98</sup> The parties registered a re-submission proceeding for ICSID arbitration in 1988 following the committee's annulment of first tribunal's award on grounds of excessive use of power and failure to state reasons in 1985. The *ad-hoc* committee, exercising caution, refused to annul the second tribunal's award. This was issued in an unpublished decision in May 1990.<sup>99</sup>

#### 3.7.2 *MINE v Republic of Guinea*

In *MINE v Republic of Guinea*<sup>100</sup> a request for arbitration was made by the complainant pursuant to Article 36 of the ICSID Convention. In its application, MINE alleged breach of contract by Guinea. The agreement between the parties was established in the French language. The implication of the above was that the agreement was deemed the applicable law between the parties supplemented by the law of Guinea. An arbitral tribunal was constituted to hear the case. In the tribunal's decision, Guinea was to pay MINE damages totalling the sum of \$12,249,483 with accrued interest. On 28 March 1988, Guinea requested partial annulment of

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<sup>95</sup>Kim (n 80 above) 264.

<sup>96</sup>The second Klöckner annulment committee decision was not published. See <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (accessed 30 March 2016).

<sup>97</sup>*MINE* (n 31 above) 79.

<sup>98</sup>*Klöckner I* (n 4 above) 95.

<sup>99</sup>Schreuer (n 83 above) 106.

<sup>100</sup>*MINE* (n 31 above) 107.



the tribunal's award. In explaining the term "partial annulment",<sup>101</sup> Guinea emphasised that it only seeks annulment as regards the claimant's breach of contract and as regards damages.<sup>102</sup>

Guinea further sought annulment of the tribunal's award to MINE regarding fees and expenses relying on the three grounds for annulment as provided in Article 52(1) ICSID Convention. It further sought stay of enforcement of the award pending the committee's decision.

In rendering its decision, the *ad-hoc* committee, in contrast to that of *Amco v Indonesia I*, held that the tribunal made an error in not identifying the correct law. It however deemed the error as technical and inconsequential and therefore not amounting to a valid ground for annulment.<sup>103</sup> The committee rejected annulment of the portion of the award which held Guinea to be in breach of contract (SOTRAMAR Agreement). The committee, however, annulled the part of the award regarding damages for failure to state reasons and cost in consequence of the annulment of the damages portion of the award. This cautious approach alleviated the concerns of critics<sup>104</sup> that the *ad-hoc* committees were improperly taking the role of an appellate body as was the case in *Klöckner v Cameroon I* and *Amco v Indonesia I*.

### **3.8 Third generation of decisions of *ad-hoc* committees'**

The third wave of *ad-hoc* committees' decisions were also cautious in interpreting their powers and they refused to review the substantive merits of a tribunal's decision under the usual guise of constituting manifest excess of power or failure to state reasons.<sup>105</sup> The implication of the above is that although this generation did not delve into substantive review of tribunal's award, its decisions are viewed as promoting inconsistencies under ICSID arbitration. These decisions are highlighted in the cases of *Wena Hotels Ltd. v Arab Republic of Egypt (Wena)*<sup>106</sup> and *Compañía de Aguas del Aconquija S.A. v Argentine Republic (Vivendi)*.<sup>107</sup>

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<sup>101</sup>*MINE* (n 31 above) 108.

<sup>102</sup>*MINE* (n 31 above) 111.

<sup>103</sup>*MINE* (n 31 above) 95–96.

<sup>104</sup>Schreuer (n 83 above) 20.

<sup>105</sup>Kim (n 80 above) 265.

<sup>106</sup>*Wena Hotels Ltd. v. Arab Republic of Egypt (Wena)* ICSID Case No. ARB/98/4, Decision on Annulment (Feb. 5, 2002), 6 ICSID Report (2002) 129.

<sup>107</sup>*Compañía de Aguas del Aconquija S.A. v Argentine Republic (Vivendi)*, ICSID Case No. ARB/97/3, decision on annulment (July 3, 2002), 6 ICSID Report (2002) 340.

### ***3.8.1 Wena Hotels Ltd v Republic of Egypt***

Here, the defendant was a state-owned Egyptian company with its own legal personality hereinafter referred to as 'EHC'. Following a lease and development agreement signed between the parties, the defendant leased two hotels located in Luxor and Cairo (Egypt) respectively to Wena. A dispute arose between the two parties relating to their respective obligations under the lease agreement. This led to seizure of both hotels by EHC on April 1, 1991. Realising the above action as an act of self-help, Egypt released the two hotels to Wena in 1992. In 1995, following Egypt's assertion of Wena's failure to pay rent and to fulfil its developmental obligations under the said agreement, Wena was evicted from the Nile Hotel in 1995, while the Luxor Hotel was placed in judicial receivership in 1997. Relying on the rights of nationals of the United Kingdom with regard to their investments in Egypt evidenced in the Promotion and Protection of Investments agreement between Egypt and the United Kingdom (hereinafter referred as 'IPPA'), Wena sought compensation from Egypt. In rendering its award, the tribunal held that Egypt violated its obligation under IPPA by failing to provide "fair and equitable treatment" and "full protection and security"<sup>108</sup> to Wena's investments in Egypt in contravention of Article 2(2) of IPPA. The tribunal further found that Egypt's actions violated Article 5 of IPPA which amounted to expropriation without prompt, adequate and effective compensation. The tribunal therefore awarded in favour of Wena the sum of USD 20 600 986.43 payable within 30 days from date of award, failure of which would accumulate additional interest at 9% compounded quarterly until paid.

On 19 January 2001, Egypt filed for annulment of the decision of the tribunal relying on the provisions of Article 52(1) of the ICSID Convention. In its request, Egypt argued that the tribunal manifestly exceeded its powers and failed to state reasons on which the award was based. The annulment committee rejected Egypt's application in its entirety.<sup>109</sup> In its decision of February 5, 2001, the committee stated that, for such alleged violation to result in an annulment, it would have to be capable of taking the tribunal to a result different from the one it arrived at.<sup>110</sup>

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<sup>108</sup>*Wena* (n 109 above) 105.

<sup>109</sup>*Wena* (n 109 above) 110.

<sup>110</sup>As above.

### 3.8.2 *Compañiade Aguasdel Aconquija and Vivendi v. Argentina*

Comparably, in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*<sup>111</sup>, the claimants, an Argentinean company and a French investor (the principal shareholder), in the course of the Argentinean privatisation campaign in the early 1990s, entered into a 30 year concession agreement for provision of water and sewage services with the Argentine Province of Tucuman on May 1995. According to the concession agreement, the claimants invested substantially in the project in order to improve the quality of its service. Soon after the grant of the concession agreement, a new Governor of Tucuman was elected. The new Governor and his party opposed the privatisation and declared that the concession was “born defective”. A resolution was adopted by the legislature of the province recommending that the newly elected Governor unilaterally impose temporal tariff reduction.

To make matters worse, government officials, following two episodes of turbidity in the drinking water, initiated non-payment of invoices for services rendered by the claimants which culminated in a decline in the claimants’ recovery of its invoices. In contrast to the provisions of the concession, governmental agencies exerted pressure on the claimants to reduce tariffs followed by a forceful mandate to re-negotiate the concession agreement. After three failed re-negotiation attempts, the claimants terminated the concession agreement on August 1997 but were forced to provide services until October 1998 by the provincial authorities. The claimants initiated ICSID arbitration proceedings claiming damages on violations of the 1991 Argentina – France BIT. They alleged that Argentina had failed to prevent the province from taking the violated action (which it was liable under international law to prevent) and also failed to take certain “federal claims” actions it should have taken. Argentina challenged ICSID jurisdiction relying on the provisions of Article 16.4 of the concession contract which provides for “parties submission to the exclusive jurisdiction of the Contentious Administrative Courts of Tucuman.”<sup>112</sup> The first tribunal held it had jurisdiction over the claims but lacked authority to examine its merits. The claimants requested annulment not of the part of the award dealing with jurisdiction but of the part dealing with merits portion of the award. The request relied on three grounds provided under Article 52(1) of the ICSID Convention.<sup>113</sup> Argentina resisted all

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<sup>111</sup>*Vivendi* (n 110 above) 340.

<sup>112</sup>*Vivendi* (n 110 above) 3 74.

<sup>113</sup>ICSID Convention art 52(1) (b), (d) & (e).

three grounds argued by the claimants. The claimants in turn objected that Argentina's counterclaim for annulment was inadmissible. The annulment committee noted that:

Thus where a ground for annulment is established, it is for the ad hoc committee and not the requesting party to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant's characterization of its request, whether in the original application or otherwise, as requiring either complete or partial annulment of the award.<sup>114</sup>

The committee further stated that:

It must guard against the annulment of awards for trivial cause.<sup>115</sup>

The committee found it necessary "to consider the significance of the error relative to the legal rights of the parties."<sup>116</sup> The committee, however, upheld the claimant's argument on excess of power by annulling the tribunal's decision on absence of jurisdiction to examine the merits of the case.

In 2003, the claimants re-submitted their application with the same claims as in the initial arbitration. They contended breach of Argentina's obligation by its Provincial Government in not treating its French investors fairly and equitably and expropriating their investment without compensation. The tribunal accepted both claims but held that, with respect to compensation, the treaty provided for lawful rather than wrongful expropriation. Relying on Article 36 of the ILC Articles on State Responsibility and the *Chorzow Factory* case<sup>117</sup>, it held that the fair market value was the most appropriate method to compensate the claimants. It awarded compensation of US\$105 million and interest at the rate of 6% compounded annually in favour of the claimants.

It follows that an examination of these two decisions of the third generation of cases confirms the careful approach that has been adopted by *ad-hoc* committees. The committee in both cases rejected a series of technical reasons advanced by parties to annul tribunal decisions. This is with the exception of the slight twist of fundamental importance that occurred in the *Vivendi* case. The central question in *Vivendi* was the relationship between an ICSID clause in

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<sup>114</sup>ICSID Convention art 52(1)(b), (d) & (e) para 41.

<sup>115</sup>ICSID Convention art 52(1)(b), (d) & (e) para 63.

<sup>116</sup>ICSID Convention art 52(1)(b), (d) & (e). para 50.

<sup>117</sup> *Factory at Chorzow (Germany. v. Poland.)*, 1927 Permanent Court of International Justice (ser. A) No. 9 (July 26).

a BIT and a domestic forum selection clause in a contract. Had the *Vivendi* tribunal decided not to annul that part of the award, it would have had a devastating effect on protection of the investor's investment and spill over into similar pending and future cases.<sup>118</sup>

Scholars have noted these decisions as indicating that the annulment mechanism has identified its proper place in international arbitration.<sup>119</sup> For some time, it was viewed that *ad-hoc* committees had accepted its mandate under Article 52 of the ICSID Convention not to indulge in the review of actual merits of tribunal's decisions. Notwithstanding the discretion exercised in the third generation of *ad-hoc* committees' decisions, an analysis of present annulment decisions indicate that *ad-hoc* committees are still uncertain as to their proper mandate under Article 52 of the ICSID Convention.

### **3.9 Recent *ad-hoc* committees' decisions adopting the 'hair trigger approach v. material violation approach'**

Recent decisions of ad-hoc committees in the cases of *Mitchell v Democratic Republic of Congo*<sup>120</sup>, *CMS Gas Transmission Co. v Argentine Republic*<sup>121</sup> and *Malaysian Historical Salvors v. Malaysia (MHS)*<sup>122</sup> point to the fact that ad-hoc committees may once again be adopting an activist approach rather than the conservative approach found under the third generation. This is observed as promoting inconsistencies in investment arbitration. Below is a background analysis of the above mentioned cases.

#### **3.9.1 Background of *Mitchell* and *MHS* cases in line with manifest excess of power redux**

The *Mitchell v Democratic Republic of Congo* and *Malaysian Historical Salvors v Malaysia* cases revolve around ICSID jurisdiction that highlights two tiers of consent: (a) both parties to the dispute i.e. the host state and national state must be signatories to ICSID Convention, and (b) both parties must have assented to submit their dispute to ICSID arbitration.<sup>123</sup> In addition

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<sup>118</sup>Schreuer (n 83 above) 20.

<sup>119</sup>Schreuer (n 83 above) 21.

<sup>120</sup>*Mitchell v Democratic Republic of Congo* ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2006) [http://italaw.uvic.ca/documents/Mitchell\\_annulment.pdf](http://italaw.uvic.ca/documents/Mitchell_annulment.pdf) (accessed 30/ March 2016).

<sup>121</sup>*CMS Gas Transmission Co. v Argentine Republic* ICSID Case No. ARB/01/8, Decision on Annulment, 136 (Sept. 25, 2007), 14 ICSID Rep. (2009) 251.

<sup>122</sup>*Malaysia Historical Salvors SDN BHD v. Gov't of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment (Apr.16, 2009) <http://icsid.worldbank.org/ICSID/> ( accessed 30 March 2016).

<sup>123</sup>ICSID Convention 1966 art 25.

to satisfying the above criteria, the dispute in issue must be one which arose directly out of an investment.<sup>124</sup>

As mentioned above, the ICSID Convention does not define the term “investment”. This has resulted in several interpretations and splitting of views between ICSID arbitral tribunals. These views are divided into two namely: “subjective” and “objective” tests.<sup>125</sup>

The choice of investment test adopted by an arbitral tribunal is directly important to determine existence of the manifest excess of power prong under Article 52(1) (b).<sup>126</sup> To qualify as a ground for annulment, such manifest excess of power must be perceived with little effort and without deeper reasoning.<sup>127</sup> In the *Mitchell* and *MHS* cases, the answer as to whether ICSID had jurisdiction on the matter was not obvious on the face of the award but dependent on the test (subjective, objective or other modified version) adopted by the tribunal. Rather than adopting the careful approach as evidenced under the third generation of *ad-hoc* committees’ decisions, the tribunal delved into the substantive reasoning of the tribunal in its definition of investment, thereby introducing further unpredictability in realm of international arbitration. Below is an analysis of such decisions.

### **3.9.2 Patrick Mitchell v Democratic Republic of Congo (DRC)**

The above dispute was initiated by Patrick Mitchell following the existing treaty between the United States and the DRC. Patrick Mitchell, a U.S citizen and representative of the law firm Mitchell and Associates, had his law office premises seized temporarily by the military court of the Democratic Republic of Congo (DRC).<sup>128</sup> Following his request for ICSID arbitration, the tribunal delivered its decision in favour of Mitchell having found that his investment was actually expropriated by the DRC in violation of the clause for non-expropriation as contained in the BIT between the parties. The DRC was ordered by the tribunal to pay Mitchell the sum of USD 750 000 in damages including interest.<sup>129</sup> Thereafter, the DRC requested annulment of

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<sup>124</sup>As above.

<sup>125</sup> WB Hamida *Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control, Ad Hoc Committee’s Decision in Patrick Mitchell v. Democratic Republic of Congo* (2007) 301 24 *Journal of International Arbitration* 301.

<sup>126</sup> *Vivendi* (n 110 above) 371.

<sup>127</sup> Hamida (n 48 above) 286.

<sup>128</sup>*Mitchell v Democratic Republic of Congo*, ICSID Case No.ARB/99/7, Decision on Annulment, 1 (Nov. 1, 2006)<http://ita.law.uvic.ca/documents/mitchellannulment.pdf>. (accessed 30 March 2016) (*Mitchell*).

<sup>129</sup>*Mitchell* (n 134 above) para 3.

tribunals' decision. In granting the request, the *ad-hoc* committee held that the tribunal had no jurisdiction over the case thereby going beyond its powers in characterising the claimants' law firm as an investment.<sup>130</sup> It further alleged that the tribunal failed to state reasons for its decision. Contrary to the tribunal in arriving at this conclusion, the committee adopted a rather robust objective test by stipulating that Mitchell's investment in DRC must add to the economic development of the country to be deemed as investment under the ICSID Convention.<sup>131</sup> In supporting the manifest excess of power ground for annulling the award, the committee highlighted the tribunal's failure to address the manner in which the claimants' services particularly benefited the defendant.<sup>132</sup> It therefore concluded that the tribunal's decision was "incomplete and obscure as regards what it considers an investment."<sup>133</sup>

It is important to underscore at this juncture that the tribunal did not expound on the points raised by the committee because it did not deem economic development as an essential feature under the definition of investment.<sup>134</sup> Also, the provision of the text as contained in the BIT defined investment as "every kind of investment."<sup>135</sup> From the above definition, a consulting law firm would possibly fall under the description of an investment. It follows that the tribunal's decision was not necessarily so incorrect as to amount to a manifest excess of power. The *Mitchell ad-hoc* committee, in annulling the award, delved into the substantive decision of tribunal's award thereby stepping beyond its mandate as provided under Article 52(1) of the ICSID Convention.<sup>136</sup>

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<sup>130</sup>*Mitchell* (n 134 above) para 48.

<sup>131</sup>*Mitchell* (n 134 above) para 27–33.

<sup>132</sup>*Mitchell* (n 134 above) para 39.

<sup>133</sup>*Mitchell* (n 134 above) para 40.

<sup>134</sup>*Mitchell* (n 134 above) para 24 – 40.

<sup>135</sup>The definition states as follows: "Investment' means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts, and includes: (i) tangible and intangible property, including all property rights, such as . . . ; (ii) a company or shares or stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment; (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trades [sic] secrets and know how, and goodwill; (v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products; (vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and (vii) returns which are reinvested." Hamida (n 48 above) 287.

<sup>136</sup>As above.

### 3.9.4 *CMS Gas Transmission Co. v Argentina Republic*

The *CMS Gas Transmission Co v Argentina Republic* dispute arose against the background of Argentina's 2001-2002 economic crises. The crises caused Argentina in a number of cases (including the present case) to "terminate the right it granted private licensees of public utilities to adjust tariffs according to the U.S. producer price index and to calculate tariffs in dollars."<sup>137</sup> This impacted negatively on investors and their investments. The crucial question was whether Argentina could raise the existence of economic crises as a doctrine of necessity in defense for its action.<sup>138</sup> The *CMS* tribunal and two other ICSID tribunals ruled that Argentina could not rely on such a necessity defence.<sup>139</sup> Argentina was therefore mandated to pay compensation to affected investors.<sup>140</sup>

A different tribunal (the fourth) dealing with the same claim of whether Argentina could raise the doctrine of necessity as a defense, deviated from the decision arrived by the two previous tribunals. The *LG & E Energy Corp. v Argentina Republic (LG & E)* tribunal found that Argentina could raise such a defense under the principles of international investment law.<sup>141</sup>

Argentina applied that the *CMS* decision be annulled. The *ad-hoc* committee rejected Argentina's request and identified "manifest errors of law" in the tribunals' decision as regards the necessity defense.<sup>142</sup> The Committee further held that such errors were not "egregious enough" to provide a ground for annulment.<sup>143</sup> The *CMS* committee therefore created "considerable disarray"<sup>144</sup> by indulging in substantive criticism of the tribunal's decision while refusing to annul the decision at the same time. The consequence of the above decision was

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<sup>137</sup>Kim (n 80 above) 272.

<sup>138</sup>WB White 'The Argentine financial crisis: state liability under BITs and the legitimacy of the ICSID' (2008) Faculty Scholarship. Paper 193. Available at [http://scholarship.law.upenn.edu/faculty\\_scholarship/193](http://scholarship.law.upenn.edu/faculty_scholarship/193).

<sup>139</sup>*Sempra Energy Int'l v. Argentine Republic*, ICSID Case ARB/02/16, Award, 348–55 (Sept. 28, 2007) [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC509\\_En&caseId=C8](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC509_En&caseId=C8) (accessed 4 April 2016).

<sup>140</sup>*CMS Gas Transmission Co. v. Argentina (CMS)*, ICSID Case ARB/01/8, Award, 217, 14 ICSID Rep.158, 193 (May 12, 2005) [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504\\_En&caseId=C4](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4) (accessed 4 April 2016).

<sup>141</sup>*LG&E Energy Corp. v. Argentine Republic*, ICSID Case ARB/02/1, Award, 2–3 (Jan. 25, 2007) <http://icsid.worldbank.org/ICSID/FrontServlet>. (accessed 04 April 2016).

<sup>142</sup>Kim (n 80 above) 273.

<sup>143</sup>As above.

<sup>144</sup>C McLachlan 'Investment Treaties and General International Law' (2008) 386 57 *International and Comparative Law Quarterly* 361-401.



that it made the tribunal's decision politically unattractive for Argentina to comply with. The committee clearly overstepped its boundary when it claimed that the "tribunal had given erroneous interpretation to Article XI" and that such an error could have had a decisive impact on the operative part of the award.<sup>145</sup> Such statements add little to this hotly debated doctrine of investment law. They highlight the overall negative impact of *ad-hoc* committees' decisions in indulging in the substantive review of the merit of tribunals' decisions without possessing the authority to do so.

### 3.1.0 Conclusion

An analysis of the provisions of Article 52 of ICSID Convention was conducted in this chapter to determine if its interpretation by *ad-hoc* committees is in line with the core principles of international arbitration. The result of the findings showed that *ad-hoc* committees' interpretation of Article 52 of ICSID Convention negates the finality of awards emphasised as a core principle of international arbitration. It was further found that *ad-hoc* committees' departure from their mandate in interpreting the above provision undermines the legitimacy of ICSID awards.

The chapter found that *ad-hoc* committees stepped outside their mandate to delve into the actual review of tribunals' decisions during the first generation. *Ad-hoc* committees were criticised for re-examining the merits of each case and crossing the line between annulment and appeal.

The second generation found the committees adopting a stricter approach in their interpretation of the grounds for annulment. This mitigated concerns by critics that *ad-hoc* committees were improperly taking on the role as appellate bodies.

The third generation of *ad-hoc* committees' decisions were more cautious in their interpretation as they refused to delve into the actual review of tribunal's decisions.

Notwithstanding the above, *ad-hoc* committees in their recent decisions have adopted a "hair trigger approach v material violation approach."<sup>146</sup> The implication of the above is that

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<sup>145</sup>Kim (n 80 above) 274.

<sup>146</sup>As above.

*ad-hoc* committees have once again adopted an activist approach rather than the conservative approach found under the third generation.

It is in view of the above that the chapter argues that the annulment provision needs to be urgently reformed in order to be in line with core principles of international arbitration.

## Chapter 4: Call for reform of ICSID annulment mechanism drawing lessons from the Appellate Body mechanism of the WTO

### 4.1 Introduction

The need to reform the annulment mechanism under ICSID jurisprudence was highlighted in the previous chapter. It is obvious that Article 52(1) of the ICSID Convention is a limited exception to the finality principle. This is aggravated by *ad-hoc* committees' inconsistent decisions which are contrary to finality of awards; a core principle of international arbitration.

It is for the aforesaid reasons that this chapter seeks to answer the question: what lessons can be drawn from the Appellate Body mechanism of the WTO in addressing the inconsistencies of ICSID *ad-hoc* committees' decisions?

To answer the question posed, a structural analysis of the WTO Dispute Settlement (WTO DS) Appellate Body mechanism will be carried out to determine whether there are lessons to be drawn in order to cure the lack of finality and predictability undermining ICSID arbitration.

Although there are several scholarly articles on reform of the annulment mechanism under ICSID jurisprudence,<sup>1</sup> this chapter argues that the most compelling is the call for establishment of an appellate mechanism modelled on the Appellate Body mechanism of the WTO.<sup>2</sup>

The chapter highlights the Appellate Body mechanism of the WTO as a suitable model for reform of the ICSID annulment mechanism because it is a system that has attained consistency and coherence in the development of WTO case law. It is therefore the aim of the chapter to determine whether there are notable lessons to be drawn from the WTO Appellate Body mechanism in addressing the lack of finality undermining ICSID jurisprudence.<sup>3</sup>

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<sup>1</sup>D Mcrae 'The WTO Appellate Body: a model for an ICSID appeals facility?' (2010) 12 *Journal of International Dispute Settlement* 371.

<sup>2</sup>Mcrae (n 1 above) 372.

<sup>3</sup> As above

It further looks at proposals for reform as advanced by the ICSID secretariat in its 2004 paper titled 'Possible Improvements of the Framework for ICSID Arbitration.'<sup>4</sup>

## 4.2 A bird's eye view on reform of the ICSID annulment mechanism

The call for reform of the ICSID annulment mechanism has attracted several scholarly writings and schools of thought. From the scholarly literature, the most contentious issue is the call for establishment of an appellate mechanism within the ICSID system.<sup>5</sup> Such mechanism is aimed at addressing inconsistencies of *ad-hoc* committees' decisions. While some scholars are in support this view, others argue that in comparison with other investor-state dispute settlement bodies such as the Permanent Court of Arbitration (PCA) and the International Court of Justice (ICJ), the existing system is much better as inconsistencies are unavoidable features prevalent even in international commercial arbitration.<sup>6</sup>

However, the establishment of a treaty based appellate body is a different school of thought as suggested by Gantz.<sup>7</sup> This author states that the procedural inconsistencies of the ICSID mechanism should be addressed *via* the establishment of an appellate mechanism incorporated in treaties between the parties. Frank's<sup>8</sup> view converges with that of Gantz as he proposes the establishment of an appellate independent body non-affiliated to any of the existing Conventions e.g. UNICITRAL, New York Convention 1958 etc.

Other advocates have suggested the introduction of an appellate mechanism modelled on the WTO Appellate Body mechanism.<sup>9</sup> Proponents here are of the view that the problem of inconsistency prevalent in ICSID jurisprudence would be solved if there were to be an appellate structure modelled on the WTO Appellate Body mechanism. In supporting this view,

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<sup>4</sup>ICSID 'Possible improvements of the framework for ICSID arbitration' ICSID Secretariat Discussion Paper, 2004 <http://www.worldbank.org/icsid> (accessed on 16 April 2016).

<sup>5</sup>C Schreuer, 'Three Generations of ICSID Annulment Proceeding' (1986) 65 *Journal du droit International* 17.

<sup>6</sup>T Walde 'Improving the mechanism for treaty negotiation and investment disputes: competition and choices as the path to quality and legitimacy' (2009) *Yearbook on International Investment Law and Policy* 506.

<sup>7</sup>D. A Gantz 'Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' (2013) 39 *Merkourios*, Volume 29, Issue 76.

<sup>8</sup>SD Franck 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions' (2005) 73 *Fordham Law Review* 1521.

<sup>9</sup>KG Kaufmann 'Arbitral precedent: dream, necessity of excuse? – The 2006 Freshfield Lecture' (2007) 23 *Arbitration International* 378.

Reinisch<sup>10</sup> states that the adoption of the institutional frameworks of the Appellate mechanism of the WTO would address the inconsistencies and unpredictability characterizing the ICSID system. Also, proposals for adoption of a reference procedures, interim assessment, transparency, publication and informed/professional peer discussion are alternatives proposed by scholars and commentators.<sup>11</sup>

In light of the above, it is hereby argued that the most compelling argument proposed for reform of the annulment mechanism under ICSID jurisprudence is the call for establishment of an appellate mechanism modelled on the Appellate Body mechanism of the WTO. The Appellate Body mechanism of the WTO is both compelling as well as deemed the most suitable model for ICSID annulment mechanism because it is a system has attained consistency and predictability in its jurisprudence. It follows that an analysis of the operation of the Dispute Settlement Appellate Body mechanism of the WTO is paramount. The analysis is aimed to understand why an appellate mechanism modelled on the Appellate Body system of the WTO is deemed the most suitable model as well as to determine whether there are notable lessons to be learnt in order to address inconsistencies of *ad-hoc* committees' decisions.

### **4.3 Operation of the WTO DS Appellate mechanism**

In conducting an analysis of the WTO Appellate Body system, it is hoped to be established that there are lessons to be drawn as to address the present inconsistencies and lack of finality characterising ICSID arbitration.

The WTO Appellate Body mechanism is a new and positive feature of the WTO DSU.<sup>12</sup> This body is responsible for the review of WTO Panel decisions.<sup>13</sup> Similar to the relationship between an ICSID tribunal and *ad-hoc* committee, this body reviews decisions rendered by a Panel to dis-satisfied countries. The Appellate Body is composed of seven persons; each division is composed of three Appellate Body Members.<sup>14</sup> Proceedings under this mechanism

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<sup>10</sup>A Reinisch 'The future of investment arbitration' in Binder C et l (eds) *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (2009) 915.

<sup>11</sup> C Tams 'An appealing option? the debate about an ICSID appellate structure' (2006) 37 57 *Essays on Transnational Economic Law* 1.

<sup>12</sup>Ewelukwa, UU 'African states, aggressive multilateralism and the WTO dispute settlement system – politics, process, outcomes and prospects' (2005) *Fellows Conference, Carnegie Council on Ethics and International Affairs: Justice and World Economy Program* 37.

<sup>13</sup> As above.

<sup>14</sup>Dispute Settlement Understanding (DSU) art 17.

are conducted in line with provisions of the DSU and Working Procedures for Appellate Review drawn up in consultation with the Chairman of the DSB and the Director General of WTO.<sup>15</sup>

The scope of the Appellate Body is limited only to issues of law as contained in the Panel Report and legal interpretations developed by the Panel on its own.<sup>16</sup> This, however, is not true in all circumstances as the Panel has the power to re-examine evidence.<sup>17</sup>

Proceedings commence under this mechanism when a Notice of Appeal is filed by a dissatisfied country to the Appellate Body. Such notice must be filed before the adoption of the Panel's Report by the DSB. As a rule, Panel Reports cannot be considered for adoption until the determination of 20 days from the date of the circulation of the report. Countries having objections to the Panel Report must provide written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the Panel Report will be considered. The Notice of Appeal will, among other things, set out the errors of law committed by the Panel. The appellant shall file a written submission on the same day that it files the Notice of Appeal.<sup>18</sup>

Any party to the dispute that wishes to respond to allegations in the appellant's submission has to file its written submission within 18 days of the filing of the Notice of Appeal. Any third party interested in the dispute may file a written submission within 21 days after the date of the Notice of Appeal. A WTO Member that was not a third party at the Panel stage cannot become one at the appellate stage.<sup>19</sup>

However, where a third party happens to identify its interest based on the content of Panel's Report, it may seek to submit an amicus brief which the Appellate Body shall accept but has no obligation to consider.<sup>20</sup>

A division of the Appellate Body (three Appellate Body Members) will have an oral hearing between 30 and 45 days after the date of the Notice of Appeal. All parties will make

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<sup>15</sup>The Rules of Conduct, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are directly incorporated into the Working Procedures for Appellate Review (WT/AB/WP/5).

<sup>16</sup>DSU art 17.6.

<sup>17</sup>United States – Certain Country of Origin Labeling (COOL) Requirements (US-COOL) - WTO/DS75/AB/R and WT/DS84/AB/R.

<sup>18</sup>Working Procedure for Appellate Review Rule 21(2).

<sup>19</sup>As above.

<sup>20</sup>WTO Dispute Settlement Body, 'Minutes of Meeting' (6 November 1998) WT/DSB/M/50.

their oral submissions following which the Appellate Body will pose questions where necessary for clarifications.<sup>21</sup>

The Appellate Body's division then exchanges views on points raised during the appeal with the four other Members of the Appellate Body. This is aimed at promoting the principle of collegiality and ensuring consistency and coherence of the Appellate Body's jurisprudence.<sup>22</sup>

The Appellate Body has the discretion to uphold, modify or set aside legal conclusions of a Panel. It is obliged to give reasons for setting aside a Panel's findings that are based on a legal issue.<sup>23</sup>

Where possible, decisions are made by consensus between the Appellate Body Members. After its deliberations, the Appellate Body drafts a report which must be adopted together with the Panel Report as the understanding of the overall ruling is dependent on simultaneous reading of both reports.<sup>24</sup>

Both reports are then placed on the agenda of the DSB for adoption. The reports must be adopted within 30 days of their circulation except where Members decide by consensus not to do so. The report is deemed final and shall not be subject to further appeal. It shall then be posted on the organisation's website and circulated in its three official languages.<sup>25</sup>

Following the adoption of the report by the DSB, the respondent is mandated by the DSB (where the complainant's violation challenge is successful) to comply with the said measures in accordance with the covered agreements.

The respondent shall inform the DSB of its intention to implement the Body's ruling and recommendation within 30 days after adoption of reports. Where immediate compliance of such recommendations and ruling cannot be attained, the respondent shall be granted

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<sup>21</sup>Working Procedure for Appellate Review, Rule 27(1).

<sup>22</sup>Working Procedure for Appellate Review, Rule 4(1).

<sup>23</sup>Appellate Body Report, Australia 'Measures Affecting Importation of Salmon' WT/DS/18/AB/R, adopted 6 November 1999.

<sup>24</sup> See DSU art 21.3.

<sup>25</sup>As above.

reasonable period of time within which to comply with the ruling. Where the parties are unable to agree on the time frame for compliance, the matter may be referred to arbitration.<sup>26</sup>

The remedies in a hierarchical order are<sup>27</sup> compliance with the rulings and recommendations of the DSB, compensation and the suspension of equivalent of concessions. It is important to underscore at this juncture that the WTO DS has been adjudged as one of the most successful inter-governmental dispute settlement mechanisms, mainly because of its structural design and high compliance rate; owing in part to the predictability and finality of WTO system.

#### **4.4 Structural design of the Appellate Body of the WTO – lessons to be learnt for the establishment an ICSID appellate mechanism**

A study on the Appellate mechanism of the WTO Dispute Settlement Body shows that it is a system which over the years has developed a “coherent and consistent” body of case laws.<sup>28</sup>

The WTO Appellate Body mechanism was established as a form of protection against “wrong cases or wrong panels”.<sup>29</sup> This body’s success in attaining finality is attributed to its structural design which can be described in terms of both its design and evolution.<sup>30</sup>

##### **4.4.1 Design factors**

The following are the design factors identified under the WTO Appellate mechanism: mandate, size, cohesive functionality and time limits (including time within which the Appellate Body renders its own decision). These factors are strictly adhered to by the Body and are each discussed below.

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<sup>26</sup> DSU arts.21.3 & 21.3(c).

<sup>27</sup> DSU art 21.1

<sup>28</sup> G Sacerdoti; A Yanovich & J Bohanes, *WTO at Ten: The Contribution of the Dispute Settlement System* (2006) 289.

<sup>29</sup>Mcrae (n 1 above).

<sup>30</sup>As above.



## *Mandate*

The DSU stipulates that the mandate of the Appellate Body is to “hear appeals from panel cases”.<sup>31</sup> Also, Article 17.6 of the DSU stipulates that an appeal heard by the Appellate Body is “limited to issues of law covered in the panel report and legal interpretations developed by the panel.”<sup>32</sup> The mandate of the Appellate Body is further guided by the provisions of Article 3.2 which states as follows;

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendation and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.<sup>33</sup>

It follows that predictability in WTO law is credited to clear delineation of the mandate of the Appellate Body. This has resulted in the clear interpretation of the provisions of the covered agreements in accordance with customary principles of international law.<sup>34</sup>

The Appellate Body has adhered strictly to its mandate and has not strayed from its mandate when interpreting WTO laws. As made clear in the DSU in the exercise of its mandate, it cannot add or diminish the rights and obligations of Members thus helping to ensure finality in WTO law.<sup>35</sup>

The above position is made clear in the case of *Canada v Periodicals*<sup>36</sup> where the Appellate Body considered its mandate to “uphold, modify or reverse the legal findings and

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<sup>31</sup>WTO Agreements, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to WTO Agreement, (1994) 33 ILM 1226, Article 17.1 DSU.

<sup>32</sup>DSU art 17.6.

<sup>33</sup>DSU art 3.2.

<sup>34</sup>XY Huang & DCY Cheng 'Protection of international investment – the study of establishing appellate mechanisms in international investment arbitration' (2004) 34 *International Review of Management and Business Research* 1822.

<sup>35</sup>WTO Dispute Settlement Body, 'Minutes of Meeting' (6 November 1998) WT/DSB/M/50, where the DSB adopted the Appellate Body Report in United States – Import Prohibition of Certain Shrimp and Shrimp Products (adopted 21 November 2001) WT/DS58/AB/R and its relevant discussion paras 105–108.

<sup>36</sup>WTO Appellate Body Report 'Canada – Certain Measures Concerning Periodicals' (adopted 30 July 1997) WT/DS31/AB/R 22.

conclusions of panel.”<sup>37</sup> In interpreting the above provision, it adhered strictly to its mandate thus ensuring consistency and predictability in its decisions.

It follows that the WTO Appellate Body’s strict adherence to its mandate has enhanced the predictability of WTO law proving that there are lessons to be learnt in addressing the lack of finality undermining ICSID arbitration.

#### *Appellate Body’s size and cohesive functionality*

The relatively small size of the Appellate Body and its cohesive functionality is partly responsible for the predictability in its decisions. The Body is made up of seven persons of “recognised authority with demonstrated expertise in law, international trade and subject matter of the covered agreements generally.”<sup>38</sup> In addition, they are to be “broadly representative of membership of the WTO.”<sup>39</sup> Three Members constitute a division of the Appellate Body. Currently, there is one member each from Africa (Mauritius), Latin American (Mexico), United States and the European Union (Belgium) and three Members from Asia (China, India and Korea).<sup>40</sup>

Reports emanating from the Appellate Body are sent to the DSB for adoption. The report is deemed to be that of the Appellate Body as a whole and not that of the division which presided over the case. Individual member opinions are anonymous<sup>41</sup>.

The cohesive feature of the Appellate Body is partly responsible for the finality of its decisions. The confidential random selection of Members for each division and the general consideration of written pleadings by all Members and not only the designated division have ensured consistency in the reports of the Appellate Body. This practice, otherwise known as 'principle of collegiality', is aimed at permeating the understanding of the regional and legal cultural differences of each case.<sup>42</sup> It is the successful operation of the Appellate Body of the WTO that has led to calls by scholars and commentators for the establishment of an appellate

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<sup>37</sup>DSU art17.13.

<sup>38</sup>DSU art 17.2.

<sup>39</sup>As above.

<sup>40</sup>As above.

<sup>41</sup>DSU art 17.11.

<sup>42</sup>S Charnovitz, 'Opening the WTO to non-governmental interests' (2000) 24 *Fordham International Law Journal* <http://www.worldtradelaw.net/articles/charnovitzngos.pdf> (accessed 17 April 2016) 173.

mechanism under ICSID jurisprudence that will draw lessons from the institutional frameworks of the Appellate Body system of the WTO.<sup>43</sup>

### *Time limits*

In addition to the above mentioned factors, Appellate Body's strict adherence to oral hearings, issuance of final reports, panel proceedings and written pleadings have extremely contributed to the unique success and predictability of the WTO Appellate system.

The WTO Appellate Body time limits for rendering its procedure have been honoured in a majority of the cases. Matters appealed to the Body take nine months and, in exceptional circumstances, 12 months from the time of filing a dispute to the time the Body delivers its report. This is in contrast to ICSID annulment arbitration which has no specific time-limit for oral hearings and issuance of final reports of *ad-hoc* committees, but only stipulates a time limit of 120 days for filing of an annulment request.

Having considered the WTO design factors in the above paragraphs, it is pertinent to analyse the evolutionary factors which complement its design factors in attaining predictability and finality in WTO law;

#### **4.4.2 Evolutionary factors**

The evolutionary factors of the WTO Appellate system are a combination of the exemplary character of individuals making up the Body supported by other extraneous factors.<sup>44</sup>

To give an example of the former, the DSU, which governs activities of the Appellate body, stipulates that its members shall not be employed on a full time basis but would be "available at all times and on short notice."<sup>45</sup> However in reality, Members of the Appellate Body operate basically on a full time basis. This is in contrast to ICSID arbitrators who function only on appointment by the Secretary-General and strictly on a part-time basis.<sup>46</sup>

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<sup>43</sup>A Alvarez-Jimenez, 'The WTO Appellate Body's decision-making process: a perfect model for international adjudication?' (2009) 13 1, *Journal of International Economic Law* 289.

<sup>44</sup>Mcrae (n 1 above) 375.

<sup>45</sup>DSU art 17.3.

<sup>46</sup>As above.

The Appellate Body provides clarifications and explanations on previous rulings.<sup>47</sup> The advantage of such rulings is the existence of a defined group of treaties unlike ICSID arbitration which deals with several interpretations of numerous bilateral and multilateral treaties.

The Appellate Body's experience in handling large number of cases that deals with similar provision in the covered agreements has enabled it to develop a consistent body of jurisprudence on specific topics.<sup>48</sup>

Aside from the character of individuals making up the Appellate Body, other evolutionary factors enhancing the predictability of WTO Appellate mechanism are: procedural matters, development of an interpretative approach, engendering of an institutional sense and balancing of subject matter of covered agreements with competing social values.<sup>49</sup> These factors are each discussed below.

### *Procedural matters*

In its early years of existence, the Appellate Body was faced with some measure of questions for which answers were not provided in the DSU.<sup>50</sup> Such questions included: which party has the onus of burden of proof in a WTO proceeding? Should a panel decide all issues raised during proceedings or only those necessary to effectively resolve disputes? Where the Appellate Body reverses a decision of a Panel, who then decides the case?<sup>51</sup> These questions, especially the latter, were important in determining the finality and efficiency of the system.

These questions were resolved by the Appellate Body in the absence of any supporting legal text either from the WTO agreements or the DSU. In answering the first question, the Appellate Body stated that a party asserting a claim of violation as contained in covered agreements must show proof to be entitled to a remedy. The Body further held that once such proof is established, the onus reverts back to the defendant to rebut the *prima facie case*.<sup>52</sup>

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<sup>47</sup>WTO Appellate Body Report, 'United States – Continued Existence and Application of Zeroing Methodology' (adopted 19 February 2009) WT/DS350/AB/R 119–21.

<sup>48</sup> R Bhala, 'The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)' American University International Law Review 14, no. 4 (1999): 845-956.

<sup>49</sup>Mcrae (n 1 above) 376.

<sup>50</sup> Mcrae (n 1 above) 377.

<sup>51</sup>As above.

<sup>52</sup>WTO Appellate Body Report 'United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India' (adopted 23 May 1997) WT/DS33/AB/R 16-17 (US-Woven Wool).

In response to the second procedural question, the Appellate Body held that “judicial economy”<sup>53</sup> means that a Panel shall only address claims which it deems expedient to address as to effectively resolve an issue in dispute.<sup>54</sup> With respect to the third procedural question relating to when the Appellate Body reverses a ruling by a panel, it decided that “it will itself complete the analysis” provided the panel made the necessary findings of fact required for completion of the legal analysis.<sup>55</sup>

This means that the WTO Appellate Body, in contrast to ICSID arbitrators, found common sense, practical solutions to issues confronting the WTO acceptable to its Members and contributing to its continued predictability. It is for this reason that ICSID is called to adopt lessons from the Appellate Body mechanism of the WTO.

#### *Development of an interpretative approach*

The WTO Appellate Body’s strict implementation of its mandate has contributed immensely to the attainment of finality in WTO law. The primary function of the Appellate Body is the interpretation of WTO covered treaties. Article 3.2 of the DSU describes the function of the WTO Dispute Settlement as clarifying the rights and obligations of parties under covered agreements in accordance to the rules of interpretation under customary international law.<sup>56</sup>

It is worth noting that the Appellate Body during its early years interpreted cases according to the international customary rules of interpretation.<sup>57</sup> What this means is that the Appellate Body, in interpreting provisions of the covered agreements relied on the rules of interpretation stipulated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties<sup>58</sup> which stipulate that a treaty should be interpreted in good faith, according to its ordinary meaning and in light of its object and purpose.<sup>59</sup>

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<sup>53</sup> Mcrae (n 1 above) 377.

<sup>54</sup> As above.

<sup>55</sup> As above.

<sup>56</sup> Mcrae (n 1 above) 278.

<sup>57</sup> WTO Appellate Body Report, 'United States – Standards for Reformulated and Conventional Gasoline' (adopted 20 May 1996) WT/DS2/AB/R 16-17(US – Gasoline).

<sup>58</sup> US – Woven Wool (n 56 above) 16–17.

<sup>59</sup> Mcrae (n 1 above) 2.

Subsequently, the Appellate Body has departed from the above approach and adopted a much more comprehensive approach over the years. It developed its own unique style in interpreting treaties which it applied to WTO-covered agreements. This style has been described as 'holistic' as the Appellate Body has departed from its dictionary definition interpretation of ordinary meaning of relevant words to a more flexible approach.<sup>60</sup> The Appellate Body has increasingly looked beyond the ordinary meaning of words to considering context, object and purpose of a treaty in its interpretation. This pattern is identified as being more inclusive than is recognised under awards interpreted by ICSID tribunals.<sup>61</sup>

#### *Development of an institutional sense*

In addition to its mandate to interpret the WTO covered agreements, the Appellate Body perceives its duty as the custodian of WTO law and has urged respect of that role from Panel.<sup>62</sup> Although there is no strict adoption of a doctrine of *stare decisis* (that is, adopting previously laid down decisions of a higher body) under WTO law, the Appellate Body has insisted on compliance to its rulings by the WTO Panels when rendering their decisions.

The above position was asserted in *US–Shrimp*.<sup>63</sup> Here, the Panel in interpreting the provisions of Article XX of GATT decided to take a different approach from that earlier adopted by the Appellate Body in *US – Reformulated Gasoline*.<sup>64</sup> On appeal, the Appellate Body gravely criticised this action and held that the Panel was in error for taking a different approach from that earlier established by the Appellate Body.

Also, in *US – Stainless Steel from Mexico*,<sup>65</sup> the Appellate Body, affirming the above position held:

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<sup>60</sup>As above.

<sup>61</sup>Mcrae (n 1 above) 378.

<sup>62</sup> R Jennings, 'The Judiciary, International and National, and the Development of International Law' (1990) 45International and Comparative Law Quarterly 9.

<sup>63</sup>WTO Panel Report, 'United States – Import Prohibition of Certain Shrimps and Shrimp Products' (15 May 1998) WT/DS58/R paras 7.27–7.47 (US – Shrimp).

<sup>64</sup> US – Gasoline (n 60 above) 16-17.

<sup>65</sup>WTO Appellate Body, 'United States – Final Anti-Dumping Measures on Stainless Steel from Mexico' (adopted 20 May 2008) WT/DS344/AB/R para 160(US – Stainless Steel).

The legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.<sup>66</sup>

It also held that:

The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermine the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.<sup>67</sup>

This strict position adopted by the Appellate Body has enhanced the finality and predictability of its jurisprudence.

### *Balancing free trade against other social values*

This last evolutionary factor shows that the Appellate Body is welcoming of views beyond what is contained in the covered agreements.<sup>68</sup> What this means is that the Appellate Body adopts a broader context in its application and interpretation of WTO provisions and does not restrict its views within the context of such agreements.

This position is evidenced in *US– Shrimp*.<sup>69</sup> Here, the Appellate Body, interpreting the provisions of Article 13 of the DSU held that WTO Panels have the power but not the responsibility to consider amicus brief.<sup>70</sup> Although amicus brief have never influenced Panel decisions under WTO law, the Appellate Body's ruling showed its open view regarding issues pertaining to civil society.

Further, in *US –Lead Bars*<sup>71</sup> the Appellate Body reiterated the above position and laid down the procedure for receiving amicus briefs.<sup>72</sup> Although this action was criticised by WTO

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<sup>66</sup>As above.

<sup>67</sup>US – Stainless Steel (n 68 above) para 161.

<sup>68</sup>Mcrae (n 1 above) 379.

<sup>69</sup>US – Shrimp (n 66 above) para 108.

<sup>70</sup>US – Shrimp (n 66 above) para 109.

<sup>71</sup>WTO Appellate Body Report, 'Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom' (7 June 2000) WT/DS138/AB/R paras 41–42.

<sup>72</sup>WTO Appellate Body Report, 'European Communities – Measures Affecting Asbestos and Asbestos-Containing Products' (adopted 5 April 2001) WT/DS135/AB/R para 50 (EC – Asbestos).

Members, it revealed to the world that Appellate Body did not perceive WTO dispute settlement in a narrow, confined and limited sense.<sup>73</sup>

Unlike ICSID jurisprudence,<sup>74</sup> the above practice has enhanced the predictability and finality of WTO law evidencing that there are indeed lessons to be learnt from the institutional frameworks of the Appellate Body system of the WTO in establishing an ICSID appellate mechanism.

#### **4.5 Criticisms of the Appellate Body mechanism of the WTO in light of the proposed ICSID appellate mechanism**

The establishment of an ICSID appellate mechanism adopting the institutional frameworks of the Appellate Body mechanism of the WTO has been criticised by some scholars.<sup>75</sup> This criticism is primarily based on the fundamental differences between international investment law and international trade law.<sup>76</sup>

International investment law is principally composed of bilateral investment agreements, multilateral investment agreements and regional trade agreements.<sup>77</sup> These agreements are not mere contractual agreements but are agreements whose provisions embody basic principles of international investment obligations, such as, the Most Favoured Nation (MFN) status, National Treatment, and Expropriation and Minimum Standard of Treatment.<sup>78</sup> These principles are part of a rich tradition in customary investment law and as such contain obligations embodied in each specific agreement which are different from each other.<sup>79</sup> Unlike WTO-covered agreements, these treaties do not provide similar wordings and have to be interpreted according to each treaty's specific terms as there is no authoritative basis for them to be interpreted alike.<sup>80</sup>

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<sup>73</sup> As above.

<sup>74</sup> *Mitchell v Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, 1 (Nov. 1, 2006) <http://ita.law.uvic.ca/documents/mitchellannulment.pdf>. (accessed 15 May 2016) (*Mitchell*).

<sup>75</sup> Mcrae (n 1 above) 381.

<sup>76</sup> A Newcombe, 'Can a global system of investment protection emerge from over two thousand BIT's and FTA's?' (2009) Unpublished paper presented to the annual conference of the Canadian Council on International Law, Ottawa.

<sup>77</sup> As above.

<sup>78</sup> R Dolzer & C Schreuer 'Principles of International Investment Law' (2008) *Kluwer Law International* 22

<sup>79</sup> A Newcombe & L Paradell 'Law and Practice of Investment Treaties: Standards of Treatment' (2000) *Kluwer Law International* 12.

<sup>80</sup> K Sauvart Appeals mechanism in international investment disputes (2008) 231.



It follows that the problem of coherency and consistency is bound to arise under the ICSID mechanism, as the task of a tribunal is to interpret specific obligations detailed in the applicable agreement and not to interpret a specific provision in a covered agreement in accordance with customary international law as is the case in WTO.<sup>81</sup> Also, the lack of an institutional sense contributes to the unlikelihood of attaining coherence.<sup>82</sup> Another argument for non-attainment of coherence under the ICSID mechanism is that it does not have specified rigid time limits like the WTO dispute settlement system.<sup>83</sup> While the WTO Appellate Body insists on adherence to previously laid down decisions and view their role as the custodian of WTO law, ICSID tribunals view their role as clarification or development of the law in a particular area taking into account the specific facts of each case.<sup>84</sup> Finally, the WTO Appellate system accepts highly developed structured materials with recognised frames of reference unlike ICSID tribunals that deal with interpretation of different agreements with no formal linkages but few similarities in their concepts.<sup>85</sup>

It is clear from the above that existing feature of coherence and consistency under the WTO jurisprudence was as a result of its consistent application of covered agreements as well as the corresponding interpretation of such agreements.<sup>86</sup> Several scholars have proposed the imposition of a concept of obligation in investment treaties in order to attain coherence in ICSID jurisprudence.<sup>87</sup> This research adds to the voice of these scholars arguing that continuous interpretation of specific treaties by ICSID tribunals shall not only enhance coherence of ICSID jurisprudence but ensure predictability and finality of its awards.

In view of the above criticisms and following tentative calls for establishment of an ICSID appellate mechanism by concerned stakeholders, the ICSID secretariat in 2008 published a paper titled 'Possible improvements of framework for ICSID Arbitration.'<sup>88</sup> One of the objectives of the paper was to consider the possibility of establishing a single Appeals Facility as an alternative to multiple mechanisms considered under several concluded treaties.<sup>89</sup>

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<sup>81</sup>As above.

<sup>82</sup>As above.

<sup>83</sup>Sauvant (n 82 above) 232.

<sup>84</sup>US – Stainless Steel (n 68 above) paras. 161 – 162.

<sup>85</sup>W Choi, 'The present and future of the investor-state dispute settlement paradigm' (2007) 10 *Journal of International Economic Law* 725.

<sup>86</sup>Mcrae (n 1 above) 383.

<sup>87</sup>Mcrae (n 1 above) 385.

<sup>88</sup>ICSID (n 3 above).

<sup>89</sup>As above.

The ICSID Secretariat believes that the creation of such a single Appeals Facility would achieve the twin goals of efficiency and economy as well as coherence and consistency.<sup>90</sup> The proposal for an Appeals Facility is modelled on the WTO Appellate Body system and is discussed below.

#### **4.6 ICSID proposal for establishment of a single Appeals Facility**

The above proposal was highlighted in the annex of ICSID secretariat paper<sup>91</sup> as mentioned above. It is important to note that Article 53(1) ICSID Convention states that “awards rendered pursuant to the ICSID Convention shall not be subject to any appeal or to any other remedy except those provided for in the ICSID Convention.”<sup>92</sup> What this means is that amendment of ICSID Convention requires unanimous consent of all ICSID contracting states.

It follows that the ICSID proposal for establishment of an Appeals Facility requires the unanimous consent of all ICSID member states deemed as an almost impossible task; at least in the short term.<sup>93</sup> It is for this reason that the ICSID Secretariat has proposed inclusion of the Appeals Facility provisions in treaties contracted between the parties to operate under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID.<sup>94</sup> The important point to note is that availability of the Appeals Facility depends solely on parties’ consent to it. It shall not be available for parties that do not consent to it. For parties in the former category, the facility shall be flexible and subject to amendments under the underlying treaty instrument.<sup>95</sup>

Such an amendment is in accordance with the general treaty law rules as provided under Article 41 of the 1969 Vienna Convention of the Law of Treaties.<sup>96</sup> The Treaty stipulates that, where parties’ consent to an Appeals Facility as evidenced in their treaty agreement, such an amendment shall be permitted provided it is not prohibited by the ICSID Convention, does not affect the enjoyment of rights and performances of obligations of other contracting states under the ICSID Convention and is compatible with the overall object and purpose of the ICSID

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<sup>90</sup>ICSID (n 3 above) 2.

<sup>91</sup>As above.

<sup>92</sup>ICSID Convention 1966 art 52(1)

<sup>93</sup>As above.

<sup>94</sup>ICSID (n 3 above) 2.

<sup>95</sup>As above.

<sup>96</sup> Vienna Convention on the Law of Treaties [www.un.org/law/ilc/texts/treaties.htm](http://www.un.org/law/ilc/texts/treaties.htm) (Vienna Convention)

Convention.<sup>97</sup> Also, other contracting states would have to be notified of such modification before conclusion of the modifying treaty between contracting parties.<sup>98</sup>

Furthermore, an ICSID Appeals Facility may be incorporated in other forms of arbitration by consent of parties in their respective treaties, for example, an Additional Facility or UNCITRAL Rules.<sup>99</sup>

As earlier mentioned, an ICSID Appeals Facility would operate under a set of ICSID Appeals Facility Rules. These Rules would provide for composition of an ICSID Appeals Facility Panel which would be made up of 15 persons elected by the Administrative Council of ICSID on nomination by the Secretary General. Eight of such Panel Members would serve 3 year terms while the remaining seven would serve six year terms each. Members of the ICSID Appeals Facility Panel would be chosen from different countries and should be persons of recognised authority with demonstrated expertise in law, international investment and investment treaties.<sup>100</sup>

The ICSID Appeals Facility Rules would further provide for constitution of an ICSID Appeals Tribunal whose Members would be appointed by the Secretary General of ICSID.<sup>101</sup> The Tribunal, consisting of three members appointed from the Appeals Panel would have the mandate to receive challenges to awards made by ICSID contracting parties. The basis of these challenges would include cases where there are clear errors of law, serious errors of fact or on any of the five grounds for annulment of an award set out under Article 52 of the ICSID Convention.<sup>102</sup> Such challenges would only arise after rendition of final awards and not before it.<sup>103</sup> Also, in order to prevent frivolous challenges, the proposed Appeals Facility Rules would provide that parties bring a challenge only after they obtain permission of a Member of the Appeals Panel chosen in advance by Panel Members.<sup>104</sup>

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<sup>97</sup>Vienna Convention (n 98 above) art 41(1) b.

<sup>98</sup>Vienna Convention (n 98 above) art 41(2).

<sup>99</sup>ICSID (n 3 above) 2.

<sup>100</sup>ICSID (n 3 above) 3.

<sup>101</sup>As above.

<sup>102</sup>As above.

<sup>103</sup>As above.

<sup>104</sup>C Tams 'An appealing option? the debate about an ICSID appellate structure' (2006) 45 57 *Essays on Transnational Economic Law* 1.

Furthermore, the Appeals Facility Rules would empower an Appeal Tribunal to uphold, modify or reverse an award.<sup>105</sup> The Appeals Tribunal would further be empowered to annul an award in whole or part on any of the grounds as stipulated under Article 52 of the ICSID Convention.<sup>106</sup> These awards would be final and binding on the parties and may be re-submitted to a new or previous tribunal where results emanating from the initial decision did not effectively dispose of the dispute.<sup>107</sup>

The proposed ICSID Appeals Facility Rules provide that a party requesting for a review of an award shall unless the Appeal Tribunal decides otherwise be responsible for all fees and expenses<sup>108</sup> and shall deposit a bank guarantee for the amount of the award before commencement of proceedings.<sup>109</sup> Also, such request shall be made to the Secretary General within the specified time limits.<sup>110</sup> Time limit for other processes, for example, filing of written pleadings between parties and time within which an appeal tribunal shall render decisions shall be stipulated so as to promote speedy process as seen under WTO Appellate system.<sup>111</sup> The Appeals Facility Rules would incorporate general undertakings by parties not to seek enforcement of award pending result of review by the Appeal Tribunal.<sup>112</sup>

Finally, the ICSID Secretariat concluded its paper by stating that, given the adoption and success of the Additional Facility Rules by the Administrative Council, an ICSID Appeals Facility adopted by the Administrative Council should be given a trial period of six years and thereafter be subject to modification in light of experience.<sup>113</sup>

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<sup>105</sup>ICSID (n 3 above) 5.

<sup>106</sup>As above.

<sup>107</sup>Tams (n 103 above) 46.

<sup>108</sup> ICSID Administrative and Financial Regulation 14, ICSID Schedule of Fees, para 3.

<sup>109</sup>Tams (n 103 above) 46.

<sup>110</sup> As above.

<sup>111</sup>As above.

<sup>112</sup>ICSID (n 3 above) 7.

<sup>113</sup>ICSID (n 3 above) 8

## 4.7 Conclusion

This chapter conducted a structural analysis of the WTO dispute settlement mechanism, particularly the appellate structure to determine why it is deemed the most suitable model for ICSID appellate mechanism and to know whether there are lessons to be drawn in addressing the lack of finality and predictability undermining ICSID arbitration. The result of the analysis was that the institutional and structural frameworks of the WTO Appellate Body mechanism which has successfully operated in the past 20 years and which has attained predictability and coherence in its jurisprudence; if adopted by ICSID, should cure the inconsistent and sometimes confused decisions of *ad-hoc* committees.

Notwithstanding the fact that the design and evolution of the WTO Appellate Body's structural system has attracted some criticisms, it has been operationally successful and useful lessons could be learnt by ICSID to address the lack of finality of arbitral decisions.<sup>114</sup>

Consideration was also given to the 2008 ICSID Secretariat paper titled 'Possible improvements of framework for ICSID Arbitration.'<sup>115</sup> The paper recommended the establishment of an ICSID Appeals Facility within the framework of treaties contracted between parties which would operate under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID. Although ICSID resolved not to pursue the above proposal in the short term,<sup>116</sup> this research argues that an appellate mechanism is indispensable for consistency and finality of ICSID awards.

It is against this background that the research proposes in the next chapter the adoption of interim measures by ICSID pending the establishment of an ICSID appellate mechanism.

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<sup>114</sup>Mcrae (n 1 above)386.

<sup>115</sup>ICSID (n 3 above).

<sup>116</sup>IM Cate 'International Arbitration and the Ends of Appellate Review' (2009) 42 1 *New York University Journal of International Law* 1204.

## **Chapter 5: Summary of findings, conclusions and recommendations**

### **5.1 Introduction**

This mini-dissertation focused on analysing the provisions of Article 52(1) of the ICSID Convention to determine whether its interpretation by *ad-hoc* committees' under ICSID jurisprudence constitutes a limited exception to the finality principle. The study was detailed in five chapters. The primary chapter of this study provided a brief synopsis of the annulment provision and presented an outline of the introductory considerations of this study. The second chapter highlighted finality of awards as the core principle of international arbitration. Chapter three analysed the grounds for annulment and underlined *ad-hoc* committees' interpretation of these grounds as negating the core principle of international arbitration. The fourth chapter calls for reform of the annulment provision while this chapter, chapter five presents summary of findings, conclusions and recommendations of the study.

### **5.2 Summary of findings**

The developments discussed in the previous chapters have underscored the need to reform the annulment provision in order to address the inconsistent and sometimes confused decisions of *ad-hoc* committees'. Following the introductory chapter of this study, chapter two interrogated the core principle of international arbitration. The chapter found finality of awards as the core principle of international arbitration and the underlying rationale for incorporation of post award remedies particularly annulment provision under the ICSID Convention.

Chapter three examined the provisions of Article 52(1) of the ICSID Convention to determine whether its interpretation is in line with the core principles of international arbitration. The chapter found that *ad-hoc* committees' interpretation of the above provision undermines finality of awards underscored as the core principle of international arbitration.

The discussions in chapter four evaluated lessons which can be drawn from the Appellate Body mechanism of the WTO in addressing inconsistencies of *ad-hoc* committees' decisions. The chapter found that the institutional and structural frameworks of the Appellate Body mechanism of the WTO if adopted by ICSID should cure the lack of finality undermining ICSID arbitration.

### 5.3 Conclusions

The central thesis of this research is that the annulment provision under ICSID arbitration constitutes a limited exception to the principle of finality and it follows that, in order to attain finality under ICSID jurisprudence, the annulment mechanism needs to be reformed. This research posits that the above objective should be achieved through the establishment of an appellate mechanism drawing notable lessons from the Appellate Body mechanism of the WTO which has operated successfully for the past 20 years. It further recommends the adoption of interim measures by ICSID pending the establishment of an appellate mechanism.

Chapter Two approached the discussion by expounding on the drafting history of the ICSID Convention and the annulment provision under the ICSID Convention. It highlighted the need for speedy settlement of disputes and protection of foreign investments as foundational objectives of ICSID arbitration. The need for finality of awards was underscored as a core principle of international arbitration and therefore viewed as the underlying rationale for the introduction of post award remedies, particularly the annulment provision under the ICSID Convention.

Chapter Three analysed the steps involved in the annulment process of ICSID arbitration. This was followed by an analysis of the grounds for annulment relying on ‘three generations’ of decisions and subsequent decisions of *ad-hoc* committees. The analysis clearly showed that *ad-hoc* committees have exceeded their mandate by reviewing the substantive merits of tribunal’s decisions thereby undermining the finality of arbitral decisions. This practice undermines one of the core principles of international arbitration.

Chapter Four conducted a structural analysis of the appellate mechanism of the WTO Dispute Settlement system to determine whether there are lessons to be drawn in addressing the lack of finality and predictability undermining ICSID arbitral awards. The result of the analysis was that the institutional and structural objectives of WTO Appellate Body system, if adopted by ICSID, should cure the lack of finality and inconsistency in awards. Following the above, consideration was given to the 2008 ICSID Secretariat paper titled ‘Possible improvements of framework for ICSID Arbitration.’ The paper recommended the establishment of an ICSID Appeals Facility within the framework of treaties contracted between parties and operates under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID. Although ICSID resolved not to pursue the above proposal

in the short term;<sup>1</sup> this research argues that an appellate mechanism is indispensable for consistency and finality of ICSID awards. It is against this background that the research proposed the adoption of interim measures by ICSID pending the establishment of an ICSID appellate mechanism.

## **5.4 Recommendations**

This research recommends the establishment of an appellate mechanism that adopts the institutional and structural objectives of the WTO Appellate Body mechanism in order to address the lack of finality undermining ICSID jurisprudence. In addition, the research recommends adoption of interim measures pending the establishment of an ICSID appellate mechanism. Such interim measures include: consolidation of cases, reference procedures, interim assessment, transparency, publication and informed/professional peer discussion and annulment committees' strict adherence to its mandate. These measures are examined in turn as follows:

### **5.4.1 Consolidation of Cases**

This is one pragmatic way of addressing *ad-hoc* committees' inconsistent decisions. Consolidation of cases is the combination of cases with the same subject matter aimed at reducing the number of inconsistent decisions rendered by *ad-hoc* committees'.<sup>2</sup> Consolidation of cases may be done formally or informally.<sup>3</sup> Cases are consolidated informally where parties voluntarily agree to nominate the same arbitrators to effectively resolve disputes in the same subject matter. By contrast, cases are consolidated formally where an investment treaty makes express provision for such consolidation. The advantage of the above procedure is that while the latter reduces the number of inconsistent decisions rendered by *ad-hoc* committees, the former effectively rules out legal rules whose interpretations are likely to conflict.<sup>4</sup> An example

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<sup>1</sup>IM Cate 'International Arbitration and the Ends of Appellate Review' (2009) 43 1 *New York University Journal of International Law* 1204.

<sup>2</sup>C Tams 'An appealing option? the debate about an ICSID appellate structure' (2006) 37 57 *Essays on Transnational Economic Law* 1.

<sup>3</sup>Tams (n 2 above) 38.

<sup>4</sup>As above.



of formal consolidation is reflected in Article 1126 of NAFTA. It allows for consolidation of cases in respect of arbitral claims arising from the same state measure.<sup>5</sup>

It follows therefore, that in addition to limiting inconsistent decisions of *ad-hoc* committees, consolidation of cases would save time and money for arbitrating parties.<sup>6</sup> In light of the foregoing, ICSID is encouraged to promote the formal and informal consolidation of cases to reduce inconsistent decisions of *ad-hoc* committees.

#### **5.4.2 Reference procedures**

Another medium to limit inconsistent decisions of *ad-hoc* committees is through the reference procedure under which controversial points of law at issue are referred to renowned international bodies for resolution. Under this medium, two references are proposed, namely: referral to the International Court of Justice and a reference procedure along the lines of provisions of Article 267 of Treaty on European Union (TEU).<sup>7</sup>

##### *References to the International Court of Justice (ICJ)*

This is not a new reference procedure under the ICSID Convention. Article 64 of the ICSID Convention makes provision for reference to International Court of Justice:

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement<sup>8</sup>

The above provision permits reference to ICJ in disputes originating between ICSID signatory contracting states regarding the application as well as the application of ICSID Convention. The implication of the above is that drafters of the ICSID Convention intended the above provision to be employed in respect of issues relating to interpretation or application of the ICSID Convention and not as an appellate option.<sup>9</sup>

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<sup>5</sup>A Crivellaro 'Consolidation of arbitral and court proceedings in investment disputes' (2005) 43 Law & Practice of International Courts and Tribunals 371.Crivellaro.

<sup>6</sup>As above.

<sup>7</sup>Tams (n 2 above) 39.

<sup>8</sup>ICSID Convention 1966 art 64.

<sup>9</sup>As above.

The ICJ is a renowned international dispute settlement body whose decisions are most unlikely to be disavowed.<sup>10</sup> Referred to as the “World Court”, the ICJ is composed of 15 permanent judges who represent “the main forms of civilization and principal legal systems of the world.”<sup>11</sup> In contrast to ICSID *ad-hoc* tribunals,<sup>12</sup> the ICJ possesses a measure of institutional authority and its pronouncements on investment law have considerable authority. Further, members of the Court are highly respected jurists of the highest international standing.<sup>13</sup>

It is regrettable that Article 64 of the ICSID Convention is yet to be invoked by any ICSID contracting state.<sup>14</sup> Some scholars<sup>15</sup> have argued that possible reasons for lack of use of the above provision may be due to the extent of expertise and creative legal argument required to effectively present disputes about specific investment treaties.

This research argues that ICSID should encourage its contracting member states to have recourse to this provision in order to address the issue of inconsistent decisions by *ad-hoc* committees. It is worth noting that such recourse would amount to use of an existing but under-used avenue available in the system.<sup>16</sup>

#### *Reference Procedure along the Lines of Article 267 TEU (Treaty on the European Union)*

In addition to the above, a reference procedure along the lines of Article 267 (formerly Article 234 of TEC) could be another reference option that could be employed by ICSID to attain the above objective. It relevantly provides as follows:

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<sup>10</sup>A Zimmermann, C. Tomuschat, K. Oellers-Frahm, C. J. Tams, T. Thienel, *The Statute of the International Court of Justice: A Commentary* (2006) 43.

<sup>11</sup>ICJ Statute art 9.

<sup>12</sup>D Kim ‘The annulment committee’s role in multiplying inconsistency in ICSID arbitration: the need to move away from an annulment based system’ (2011) 259 242 *New York University Law Review* 263.

<sup>13</sup>Tams (n 2 above) 40.

<sup>14</sup>Tams (n 2 above) 41.

<sup>14</sup>As above.

<sup>15</sup>Tams (n 2 above) 42.

<sup>15</sup>ICJ Statute art 9.

<sup>16</sup>As above.

The {European} Court of Justice shall have jurisdiction to give preliminary rulings concerning;

- i. the interpretation of this Treaty;
- ii. the validity and interpretation of acts of the institutions of the Community and of the ECB;
- iii. the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide...<sup>17</sup>

This provision is utilised in practice by European national courts to refer certain issues of law to the European Court of Justice (ECJ) for decisions.<sup>18</sup> In rendering its ruling on such points of European Community (EC) law, the ECJ does not assume the role of appellate courts but merely interprets the concerned controversial point of law at issue.<sup>19</sup> Experience has further proved that this procedure has assisted tremendously in shaping the uniform applicability of EC/EU law.<sup>20</sup>

It is important to emphasise that inclusion of this procedure under ICSID jurisprudence would not conflict with Article 53 of ICSID Convention. The implication of the above is that, although such inclusion would not require unanimous consent of ICSID member states; it would require amendment of ICSID rules entailing more procedural steps than other alternatives above mentioned.<sup>21</sup>

Notwithstanding the above, this research posits that a similar referencing procedure shall enhance consistency and uniformity of ICSID awards.

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<sup>17</sup>TEU art 267.

<sup>18</sup>T Tridimas & JA Gutierrez-Fons, *EU Law, International Law, and Economic Sanctions Against Terrorism: The Judiciary in Distress?* (2008) 32 2/9 *Fordham International Law Journal* 660  
<http://ir.lawnet.fordham.edu/ilj/vol32/iss2/9>.

<sup>19</sup>Tams (n 2 above) 41.

<sup>20</sup>As above.

<sup>21</sup>Tams (n 2 above) 42.

### 5.4.3 Interim assessment

Another medium of addressing the problem of inconsistency of ICSID awards is interim assessment whereby awards are scrutinised and arbitrators informed of the risks involved in departing from previous decisions.<sup>22</sup> The above is similar to interim rulings of WTO Panels evidenced in the case of *US -Stainless Steel from Mexico*.<sup>23</sup>

If ICSID arbitrators are to adopt this practice as an interim measure pending the establishment of an ICSID appellate mechanism, it would contribute to the realisation of the core objective of having finality and predictability of arbitral awards.

### 5.4.4 Transparency, publication and informed/professional peer discussion

As previously mentioned, the ICSID secretariat published in 2008 a paper titled 'Possible Improvements of the Framework for ICSID Arbitration'<sup>24</sup> which initiated discussions about reform of procedural aspects of ICSID jurisprudence. It revealed positive steps undertaken by ICSID in promoting greater transparency in arbitral proceedings.<sup>25</sup> This is evidenced in the publishing of awards and the possibility of NGO submitting *amicus curiae* briefs among other things.<sup>26</sup>

It can be surmised that greater consistency of ICSID awards could be attained if *ad-hoc* committees were encouraged to consult informed publications.<sup>27</sup> Further, *ad-hoc* committees' explanations of contradictory approaches with reference to specificities of cases before them could limit inconsistency of awards.<sup>28</sup>

It is in view of the above that ICSID is being encouraged in the interim to adopt the above towards furthering the objective of enhancing predictability in awards.

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<sup>22</sup>As above.

<sup>23</sup>WTO Appellate Body, 'United States – Final Anti-Dumping Measures on Stainless Steel from Mexico' (adopted 20 May 2008) WT/DS344/AB/R para 160(US – Stainless Steel).

<sup>24</sup>ICSID Secretariat Discussion Paper, October 22 2004.

<sup>25</sup>Walde, 'The 'Umbrella' Clause on Investment Arbitration – A Comment on Original Intentions and Recent Case', (2005) 6 2 *Journal of the World Investment and Trade* 184.

<sup>26</sup>ICSID Rules <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> (accessed 30 April 2016).

<sup>27</sup>Tams (n 2 above) 34.

<sup>28</sup>Tams (n 2 above) 35.

#### 5.4.5 Annulment committees' strict adherence to its mandate

The mandate of *ad-hoc* committees as stipulated in Article 52(1)<sup>29</sup> is to annul awards based on limited grounds provided therein. Article 52(3)<sup>30</sup> further stipulates the authority of the Chairman of the Administrative Council of ICSID to appoint a three –person *ad-hoc* committee based on a set criterion for purposes of annulment.<sup>31</sup>

The lack of finality of ICSID awards could largely be attributed to *ad-hoc* committees' exceeding their mandate and reviewing the substantive merits of a case.<sup>32</sup> This is illustrated in the inconsistent decisions rendered between the first generation,<sup>33</sup> second generation<sup>34</sup> and third generation<sup>35</sup> of cases and subsequent decisions of *ad-hoc* committees.

This research encourages ICSID to borrow a leaf from the WTO Appellate Body's strict restriction to its mandate<sup>36</sup> so as to enhance coherence and predictability in its jurisprudence.

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<sup>29</sup>ICSID Convention 1966.

<sup>30</sup>As above.

<sup>31</sup>ICSID Convention 1966 art 52 (3).

<sup>32</sup>C Scheuer, 'Three Generations of ICSID Annulment Proceeding' (2003) 18

<sup>33</sup> *Klöckner Industrie-Anlagen GmbH. Republic of Cameroon (Klöckner I)*, ICSID Case ARB/81/2, Decision on Annulment (May 3, 1985), 2 ICSID Report (1994).

<sup>34</sup>*Mar. Int'l Nominees Establishment v. Republic of Guinea (MINE)*, ICSID Case ARB/84/4, Decision on Annulment (December 22, 1989), 4 ICSID Report (1997) 82. para 107

<sup>35</sup>*Wena Hotels Ltd. v. Arab Republic of Egypt (Wena)* ICSID Case No. ARB/98/4, Decision on Annulment (Feb. 5, 2002), 6 ICSID Report (2002) 129

<sup>36</sup>DSU art 17.6.

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